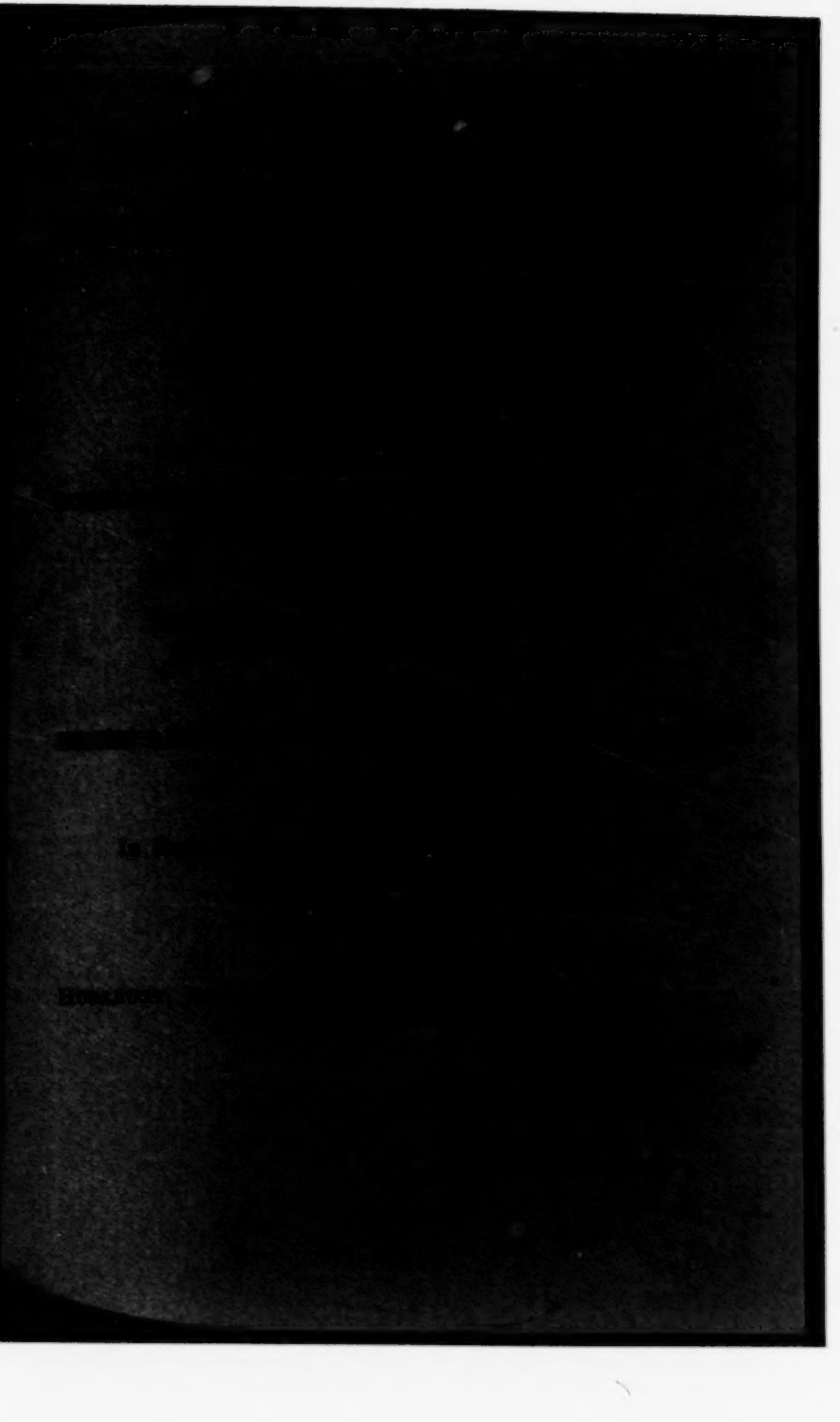


11953

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.
No. 134.

COSMOPOLITAN MINING COMPANY,
Plaintiff in Error,
vs.
THOMAS F. WALSH,
Defendant in Error.

STATEMENT OF THE CASE.

This was an action in ejectment, brought November 3, 1900, by the plaintiff in error, a corporation organized and existing under the laws of the State of Maine, against the defendant in error, a citizen of the State of Colorado, in the United States Circuit Court for the District of Colorado, to recover from the defendant in error the possession of seven lode mining claims and five mill sites situated in Sneffles mining district in Ouray County, Colorado, of the value of more than two thousand dollars, together with nominal damages for the ouster and the costs of the action.

Plaintiff in error derives its title to the property in controversy through patents from the United States and mesne conveyances, all of which were admitted in evidence without objection to their form or sufficiency. (Folios 49 to 58.) The defendant in error offered to prove the payment of taxes and the expenditure of money by him upon the property, but the proof was excluded by the court below. (Folios 156 to 158.) Tax deeds conveying the Norma mill

site and the Yellow Rose mill site to the defendant in error were introduced in evidence and were not attacked in any way. It will therefore be admitted that plaintiff in error is the owner, and entitled to the possession, of all the property in controversy (except the above-named mill sites) unless its title has been divested by virtue of some subsequent proceedings. As constituting such proceedings the defendant in error relies, *first*, upon four judgments rendered by default in the County Court of Ouray County, Colorado, against the plaintiff in error, the sheriff's sale and deed made thereunder and a conveyance to himself from the sheriff's grantee, and, *second*, relies upon a decree, by default, obtained by him, against the plaintiff in error, in an action to quiet title in District Court of the County of Ouray.

*These proceedings are, in substance as follows:

The first suit brought in the County Court of Ouray County was that of The A. W. Begole Mercantile Company *against* Cosmopolitan Mining Company, the complaint being filed on or about April 26, 1895. The complaint alleges that the plantiff therein is a Colorado corporation, doing business in Ouray, and "that the defendant is a corporation duly incorporated and organized under and by virtue of the laws of the State of Maine, with its principal office in the State of Colorado, at Ouray, in said Ouray County." Judgment is prayed for the principal sum of $213.02, upon two causes of action, on account of merchandise alleged to have been furnished the defendant between May 8, 1894, and January 1, 1895. (Folios 118–119.) On April 26, 1895, the plaintiff filed a sufficient undertaking in attachment (Folio 120), and on the same day J. C. Marsh, as president of the plantiff corporation, made and filed a sufficient affidavit, in attach-

*Owing to the fact that portions of these proceedings were offered in evidence at different times, they are to be found at separate places in the transcript of record. For the convenience of the Court we have, in an appendix to the brief, set out the complete record of each proceeding in chronological order. The Colorado Statutes referred to in the argument will also be found in the appendix.

ment (Folio 121), and thereupon, on the same day, a writ of attachment was issued by the court to the sheriff of Ouray County, commanding him to serve a copy of the writ upon the defendant and attach its property (Folio 74). On the same day the sheriff of Ouray County made return of the writ of attachment by stating that he had levied upon and attached the property in controversy in the suit at bar, describing it, by filing a copy of the levy in the office of the recorder of Ouray County, but returned that he was unable to make service of the writ on the defendant, there being no person in his county upon whom process might be served. (Folio 75.) On April 29, 1895, a summons in the usual form was issued by the court which does not appear to have ever been in the hands of the sheriff of Ouray County, but was returned by the sheriff of San Miguel County, Colorado, May 7, 1895, in the following language: "I do hereby certify that I have served the within summons, together with a copy of the complaint in the within stated action, on this 7th day of May, A. D. 1895, by personally delivering a true copy of said summons, together with a copy of the original complaint in the action therein mentioned, thereto attached, to J. M. Jardine, the duly authorized agent of the within defendant company." (Folios 122–123). On April 29, 1895, another writ of attachment was issued by the Court addressed to the sheriff of San Miguel County, being a duplicate of the first writ of attachment, and the sheriff made the following return thereon: "I do hereby certify that I have duly executed the within writ on this 7th day of May, A. D. 1895, by delivering a true copy of the within writ to J. M. Jardine, the duly authorized agent of the within defendant company." (Folio 124.) On June 27, 1895, default was entered and judgment was rendered against the defendant for $226.09, and $24.58 costs, and the attachment was sustained and a special execution ordered. (Folios 70–71.) On July 23, 1895, a special execution was issued by the Court to the sheriff of Ouray County, which

recites the attachment of the property, describing it, and recites that judgment was rendered against the Cosmopolitan Mining Company in favor of The A. W. Begole Mercantile Company for $226.09, and $24.58 costs. The writ of execution then proceeds as follows: "We therefore command you, that you immediately proceed to sell the property by you levied upon, as hereinbefore described, or so much thereof as is necessary to make the aforesaid sums of money, with interest on said judgment, from the day of the rendition of the same; and to have the same money ready, as soon as may be, to render unto the said court for adjustment according to law, allowing the several judgment-creditors in proportion to the amount of their several claims as adjusted." The sheriff of Ouray County made return of the execution as follows: "In obedience to the command of the within execution, I have executed the within writ by offering for sale on the 24th day of August, 1895, in the manner provided by law, and selling the property described in said writ, at public sale at the front door of the court-house in the City and County of Ouray, Colo., that said mining claims were first offered for sale separately; receiving no bids on said claims I offered the same for sale all together. That in accordance with an agreement entered into by and among the several prorating creditors, the same were struck off and sold to J. C. Marsh, as trustee for the several judgment-creditors, for the sum of $1,616.97; and I therefore return this execution fully satisfied." (Folios 126 to 128.)

The second action brought in the County Court of Ouray County was that by John Ashenfelter *against* Cosmopolitan Mining Company. The complaint was filed on or about May 21, 1895. The allegation that the defendant was a foreign corporation with its principal office in Colorado, at Ouray, is the same as that quoted from the complaint in the foregoing case of The A. W. Begole Mercantile Company. This complaint sets up a cause of action on account of work and labor to the amount of $47.90, performed for

the defendant between June 1, 1894, and December 31, 1894; alleges that suit has been brought by The A. W. Begole Mercantile Company and prays to be made a party plaintiff therein. The affidavit and bond in attachment, summons, writs of attachment with the returns of the sheriffs of Ouray and San Miguel counties thereon, are all substantially the same as those found in the action brought by The A. W. Begole Mercantile Company, except that the sheriff of Ouray County in his return of the writ of attachment does not state that he could find no person in his county upon whom process might be served. (Folios 105 to 110.) On June 27, 1895, default and judgment for the sum of $49.82 and $22.70, costs, were entered against the defendant (Folios 67 and 68), and on July 23, a special execution was issued directed to the sheriff of Ouray County which, except that it differs in the amount to correspond with the judgment obtained by Ashenfelter, is the same as the execution in the case brought by The A. W. Begole Mercantile Company. (Folio 115.) The sheriff of Ouray County made the following return of this execution, viz: "I hereby return the within execution fully satisfied in accordance with my return made on the execution issued in the case of The A. W. Begole Mercantile Company *vs.* the Cosmopolitan Mining Company." (Folio 115.)

The third action brought in the County Court of Ouray County was that of P. H. Fennell *against* The Cosmopolitan Mining Company. The complaint was filed on or about the 23d day of May, 1895. The first cause of action was for $58.75, for work and labor performed for the defendant between June 30, 1894, and August 1, 1894, and the second cause of action was for a like amount for work and labor performed by one John Dowd, between the same dates, the account having been assigned to the plaintiff. (Folios 131–132.) All of the record in this case is the same as that in the foregoing case of John Ashenfelter *against* the Cosmopolitan Mining Company (Folios 131 to 141), except that default, and judgment for $126.12, and

$22.82 costs, were entered against the defendant on July 10, 1895. (Folio 76.)

The fourth case brought in the County Court of Ouray County was that of William C. Fulton *against* Cosmopolitan Mining Company. The complaint was filed on or about May 25, 1895, and contains the following allegation: "That defendant is a corporation duly organized under the laws of ————." The complaint asked for judgment on account of work and labor performed in the working of the Hidden Treasure mine prior to November 4, 1893, for the sum of $922.80. (Folio 144.) The complaint makes no mention of the suit brought by The A. W. Begole Mercantile Company nor does it ask that Fulton be made a party plaintiff therein. An undertaking in attachment was filed May 25, 1895, and, on the same day, an affidavit in attachment was made and filed. In this affidavit it is stated: "That the defendant is a foreign corporation." (Folio 145-146.) A writ of attachment was issued by the court on June 13, 1895, addressed to the sheriff of Ouray County. It does not appear that this sheriff did anything with the writ or attempted to make any levy under it. The sheriff of San Miguel County makes the return, which is the same as those made by him in the other cases. (Folio 147-148.) The summons was issued on June 13, 1895, and was returned by the sheriff of San Miguel County June 22, 1895, in the same manner as the preceding cases. (Folio 149-150.) On July 26, 1895, default and judgment for the sum of $1,049.90, were entered against the defendant, and a special execution ordered. A general execution was issued by the court on July 27, 1895, addressed to the sheriff of Ouray County, which recites the rendition of the judgment, makes no reference to an attachment, but commands the sheriff to make the amount of the judgment and $15.40 costs out of the general property of the defendant, and adds "And have you these moneys ready to render to the said court for damages for adjustment among the several judgment-creditors in proportion to the amount of their respec-

tive claims, and costs aforesaid." (Folio 151). This execution was returned as satisfied by the sale made in the case of The A. W. Begole Mercantile Company *against* The Cosmopolitan Mining Company, in the same manner as that in the returns of the special execution in the actions brought by John Ashenfelter and P. H. Fennell. (Folio 151.) The record in this case brought by William C. Fulton was not admitted in evidence by the court below. (Folio 153.)

In the files of the action brought by The A. W. Begole Mercantile Company appears a document entitled a "Prorating Order." It is unsigned, bears no date nor any evidence of having been filed or entered in the case. It recites that the plaintiff has made a motion for an order prorating the amount to be realized from the sale of the attached property by the several attaching and judgment creditors; recites that the following judgments have been rendered against The Cosmopolitan Mining Company by virtue of several attachments, viz: "The A. W. Begole Mercantile Co., $226.09; John Ashenfelter, $49.82; P. H. Fennell, $126.12; W. C. Fulton, $1,049.90; and D. L. Golden, $," and orders the Sheriff of Ouray County to sell the attached property or so much thereof as shall be necessary to satisfy the several judgments. In case the amount realized is insufficient for this purpose it is ordered that the costs of the several proceedings be paid in full and the balance prorated among the judgment-creditors except Golden, whose judgment was said to be settled. (Folios 128-129).

On May 27, 1895, J. M. Jardine, upon whom all of the process in all of the foregoing actions was served, filed, in the case brought by The A. W. Begole Mercantile Company, the following sworn statement:

"Comes now J. M. Jardine, upon whom papers purporting to be a summons and writ of attachment in the above-entitled cause were served on May 8, 1895, and respectfully represents to the court:

1st. "That he is not, and has not been for several years

past, a resident of Ouray County in said State, and therefore could not be an Agent of defendant company in accordance with the general laws of this State under the facts alleged in the complaint herein.

2d. "That he has not for years acted as agent of said company defendant, does not consider himself or hold himself out to be such agent and refuses to accept service or do any other act on behalf of said defendant." (Folios 162-163.)

This statement was excluded by the court below. (Folio 164.)

Copies of a resolution of the plaintiff in error designating Ouray as its principal place of business and designating J. M. Jardine as its process agent, dated December 16, 1885, certified by the clerk and recorder of Ouray County and by the secretary of state of Colorado, together with a statement that such designation had not been revoked, was received in evidence over the objection of plaintiff in error, and to which ruling an exception was taken. (Folios 64-65.)

Plaintiff in error introduced the testimony of the witnesses William Story and Maurice Corbett, the sheriff of Ouray County, showing or tending to show that, at the time these suits were brought in the County Court of Ouray County, it had no office in Ouray. (Folios 171, 172, 173, 174, 178 and 179.)

On March 1, 1897, the defendant in error brought suit against the plaintiff in error and J. M. Jardine, in the District Court of Ouray County, Colorado, by filing a complaint. The complaint alleges:

"The defendant is a corporation organized under the laws of the State of Maine, for the purpose, among others, of carrying on a mining business in the County of Ouray and State of Colorado, and by certificate dated December 16, 1885, recorded in Book C–1, page 291, on January 21, 1886, the said J. M. Jardine, afterwards was, as required by the laws of the State of Colorado, duly appointed as the authorized agent of the defendant company, upon whom process might be served."

The complaint further recites the proceedings in the foregoing actions brought by The A. W. Begole Mercantile Company, John Ashenfelter and P. H. Fennell, including the sale to J. C. Marsh, as Trustee; the assignment of the certificate of purchase by Marsh to one Osborn and the conveyance of the property to the plaintiff (Walsh) by Osborn. The complaint further alleges that plaintiff is in actual and peaceable possession of the property, is the owner in fee thereof and is expending large sums of money thereon; that notwithstanding the proceedings in the County Court the defendants claim they still hold some interest in the property, adverse to the said claim of the plaintiff, and that the plaintiff is prevented thereby from obtaining necessary assistance and capital for the development of the property. It is then prayed that the defendants be required to come into court, specify the nature of their claims and have them adjudicated; that it be determined by the court that the defendants have no right, title or interest in the property, and that plaintiff be given general relief. (Folios 82, 83, 84.)

On March 1, 1897, a summons, in the usual form, was issued by the court, upon which the sheriff of Ouray County made the following return:

"I do hereby certify that I have served the within summons together with a copy of the complaint in the within-stated action on this 4th day of March, A. D. 1897, by personally delivering a true copy of said summons, together with a copy of the original complaint in the action therein mentioned thereto attached, to the within-named defendants, Cosmopolitan Mining Company and the said J. M. Jardine, at Ouray in said County. I further certify that the service of the summons and complaint upon the The Cosmopolitan Mining Company was made by delivering to John M. Jardine, the duly authorized agent of the defendant company and designated by it as the person upon whom service should be made, a copy of said summons with a copy of the complaint attached specially for said defendant company." (Folios 86-87.)

On the next day, March 5, 1897, the defendant Jardine filed an answer stating that he had no interest in the matter except that process in the County Court cases had been served upon him as agent of the defendant company; that he had mailed the papers to the president of the defendant company with return card on the envelope; that the letters had not been returned to him, nor was he instructed to defend the suits, and knew of no defense and therefore allowed judgments to be taken, and that since the entry of the judgments and sale thereunder he does not claim any interest in the property. (Folio 85.) On March 25, 1897, the default of the defendant Cosmopolitan Mining Company was entered (Folio 88), and on May 11, 1897, a decree was entered, which recited the default of the defendant Cosmopolitan Mining Company after due service of summons, and that the evidence of the plaintiff had been taken and documentary evidence examined. The decree then makes findings in substantially the same language as that used in the bill of complaint and then decrees as follows:

"That the said defendants have not nor has either of them any right, title, interest, claim or demand in or to any part of the premises above described and that the pretended claim of the defendant The Cosmopolitan Mining Company in and to said premises is wholly without right or justification of law. That the plaintiff is the owner and in possession of the premises and mining claims above described and entitled to the quiet and peaceable possession of said mining claims and each of them." (Folios 89 to 92.)

Plaintiff in error offered, but was not allowed, to prove that it was not doing business in Colorado at the time of the bringing of this suit to quiet title, unless it should also prove that it had not designated a process agent. (Folios 165-166.)

The plaintiff in error made a motion for a directed verdict in its favor as to all of the property in the controversy, except the Norma and Yellow Rose mill sites, which was

denied, and upon motion of the defendant in error a verdict was directed in his favor. (Folio 188.)

Exceptions were taken to the adverse rulings of the court below and errors assigned thereon (Folio 41), and the Transcript purports to contain the entire record, Folio 198.

The contention of plaintiff in error in this case is that the four judgments rendered in the County Court and the decree entered in the District Court of Ouray County were rendered and entered without jurisdiction in the respective courts, for the lack of due service of process upon the plaintiff in error; that the sale made under the four judgments in the County Court was void, for want of jurisdiction in the court, and lack of authority in the officer; and that the effect of these proceedings is to deprive plaintiff of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

The question of the validity of these judgments, of the sale made thereunder and of the decree is raised by the pleadings in the case, the objections of plaintiff in error to their admission in evidence and by a motion by plaintiff in error for directed verdict.

SPECIFICATION OF ERRORS.

The following are specifications of the errors, upon which the plaintiff in error relies for a reversal of the judgment of the trial court, and they are arranged, as far as possible, in the order in which they will be discussed.

1. The court below erred in admitting in evidence the records of the cases wherein The A. W. Begole Mercantile Company (Defendant's Exhibits 9, 10 and 19), John Ashenfelter (Defendant's Exhibits 8 and 20) and P. H. Fennell (Defendant's Exhibits 11 and 21) were plaintiffs, respectively, and Cosmopolitan Mining Company was defendant, in the County Court of Ouray County, Colorado; said records consisting of certified copies of the complaints, summons with the returns endorsed thereon, affidavits in

attachment, undertakings in attachment, writs of attachment with the returns endorsed thereon. defaults, judgments, judgment dockets, prorating order of sale and writs of special execution with the returns endorsed thereon; each of which records shows that Cosmopolitan Mining Company "is a foreign corporation, organized under the laws of the State of Maine with its principal office in the State of Colorado at Ouray, in Ouray County; that service of the summons, complaints and writs of attachment were made upon J. M. Jardine, in San Miguel County, Colorado, as the "duly authorized agent" of Cosmopolitan Mining Company; and that said defendant company made default, and the property in controversy in this action was sold, to satisfy the judgments rendered in those cases, but which records fail to show that Cosmopolitan Mining Company was doing business in the State of Colorado at the time of the commencement of any of the actions, or at the time any service of process was made therein, and fail to show that J. M. Jardine was such an agent as to authorize the service of process upon him, and show that he was not served in the county of the action. (Assignment of Errors Nos. 7, 8 and 9, Folios 44-46, pp. 21 and 22.)

2. The court below erred in admitting in evidence defendant's Exhibits No. 5 and No. 6, consisting of copies of the resolution of plaintiff in error designating Ouray, Ouray County, as the principal place where the business of plaintiff in error was to be carried on in Colorado, and appointing J. M. Jardine its agent upon whom process might be served, certified respectively by the clerk and recorder of Ouray County and by the secretary of state of Colorado. (Assignments of Errors 1-2, Folios 41-42, p. 20.)

3. The court below erred in admitting in evidence Defendant's Exhibit No. 7, in which it is certified that the designation of Ouray as the principal place of business and the appointment of J. M. Jardine as process agent had never been revoked of record. (Assignment of Errors No. 3-4, Folio 42, p. 20.)

4. The court below erred in excluding the notice (Plaintiff in Error's Exhibit R) filed by J. M. Jardine in the case of The A. W. Begole Mercantile Company *vs.* Cosmopolitan Mining Company (Defendant in Error's Exhibits 9-10-19) which notice stated that Jardine had not acted as agent for the Cosmopolitan Mining Company for some years prior to service upon him as agent and that he refused to act as such agent (Assignment of Errors No. 10, Folio 45, p. 22) and which notice is quoted in full in the foregoing statement of the case.

5. The court below erred in admitting in evidence the record in the case of Walsh *vs.* Cosmopolitan Mining Company and J. M. Jardine, in the District Court of Ouray County (Exhibit 13 of Defendant in Error) consisting of certified copies of the complaint, the answer of J. M. Jardine, writ of summons and the return endorsed thereon, the præcipe for a default, the order of default, the transcript of the judgment docket and the decree, which record shows that Cosmopolitan Mining Company, defendant therein is a foreign corporation, "organized for the purpose, among others, of carrying on a mining business in the County of Ouray and State of Colorado;" that J. M. Jardine was by certificate dated December 16, 1885, recorded January 21, 1886, appointed its agent upon whom process might be served; that service was made March 4, 1897, upon said Jardine as such agent; that the defendant company made default; that a decree was entered finding that the plaintiff, Walsh, was the owner of the property and that Cosmopolitan Mining Company had no right, title or interest therein, but which record wholly fails to show that Cosmopolitan Mining Company was doing business in the State of Colorado, at the time such action was commenced or the service therein made. (Assignment of Errors No. 5, Folios 42-43, pp. 20 and 21.)

6. The court below erred in refusing to allow plaintiff in error to introduce testimony to prove that it was not doing business in the State of Colorado; and that it had no

office in Ouray County, Colorado, at the time of the institution of the action (Defendant's Exhibit 13) in the District Court of Ouray County, Colorado, wherein Thomas F. Walsh was plaintiff and Cosmopolitan Mining Company was defendant. (Assignment of Errors Nos. 11-12, Folio 46.)

7. The court below erred in refusing to direct the jury to return a verdict for the paintiff in error. (Assignment of Errors No. 14, Folio 47, p. 22.)

8. The court below erred in giving the following instruction to the jury, viz:

"Gentlemen of the jury, in the view the court takes of this case it becomes a question of law and the court will instruct you to find a verdict in favor of the defendant and that the defendant is entitled to the possession of the demanded premises." (Assignment of Errors No. 15, Folio 47, p. 23.)

ARGUMENT.

Jurisdiction of This Court:

This case comes to this Court on writ of error, directly, from the Circuit Court of the United States for the District of Colorado, and the first question presented may, therefore, be deemed to be the jurisdiction of this Court to hear and determine the case.

It was brought here under that clause of Section 5, 26 U. S. Statutes, 828, which provides that where the construction or application of the Federal Constitution is involved, an appeal or writ of error may be taken to this Court from the Circuit Courts. We submit that the application of that portion of the Fourteenth Amendment to the Constitution of the United States which provides that no person shall be deprived of his property, without due process of law, is involved in the case at bar, and that the determination of this question was necessary to a decision of the case in the court below, and is necessary here.

The question was raised at the first opportunity by plain-

tiff in error in the court below, by its amended replication. (Folios 29 and 30.) It was raised again, at the trial, by the specific objections of plaintiff in error to the admission in evidence of the records in the four actions in the County Court of Ouray County, and of the record of the suit to quiet title in the District Court of Ouray County. (Folios 94 and 95–153.) It was also raised in the rejection of Jardine's affidavit that he was not the agent of plaintiff in error, and the question was again presented by the motion of plaintiff in error for a directed verdict, all of which is duly certified by the judge of the trial court. (Folio 40.)

The judgments of the County Court of Ouray County are attacked solely upon the ground that they were rendered without due process of law, inasmuch as the court never obtained jurisdiction over this plaintiff in error. The judicial sale made under these judgments is attacked on the sole ground that we were thereby deprived of our property without due process of law. And the decree rendered by the District Court of Ouray County, in the suit to quiet title, is attacked upon the ground that it was rendered without due process of law, both because the court had no jurisdiction over plaintiff in error, and because it had no jurisdiction to render such a decree, in that action, aside from the question of service.

Practically the only questions involved in this case are therefore those which present the application of the Fourteenth Amendment to the Federal Constitution.

It is true that the court below, so far as the complaint therein shows, acquired jurisdiction by reason of diverse citizenship of the parties. The complaint, however, could not have raised the constitutional question, because plaintiff in error could not know that the defendant in error would rely upon the judgments and proceedings that present the question.

As soon as these proceedings and judgments were set up in defense, plaintiff in error raised the question as we have shown. We submit that the case at bar falls within the

doctrine announced by this court in the case of Loeb *vs.* Columbia Township Trustees, 179 U. S., 472, 477, 481. That case differs, substantially, from the case at bar, only in the fact that the question involved there was the invalidity of a State statute, as being in contravention of the Federal Constitution, instead of the question of the application of the Federal Constitution, as in this case. Section 5, of 26 Stats. supra, gives the same right to come here by writ of error on the one question as on the other. The facts in that case were that Loeb sued the town of Columbia on certain of its bonds, in the Circuit Court of the United States for the Southern District of Ohio; the sole ground of Federal jurisdiction being diversity of citizenship. The town defended on the ground, among others, that the statute of Ohio, under which the bonds were issued, was invalid under the Constitution of the United States. This defense was sustained and the plaintiff brought the case directly to this court on error. This court held that it had jurisdiction, notwithstanding the fact that the petition showed only diversity of citizenship as ground for jurisdiction in the court below, since the act gave this court jurisdiction in "any case" where a State statute was claimed to be in contravention of the Constitution of the United States, and that it was immaterial whether the question was raised by the plaintiff or the defendant.

See also Holder *vs.* Aultman, 169 U.S., 81, 88, 89.

Connelly *vs.* Union S. P. Co., 184 U.S., 540, 544, 545.

And this court has recently taken jurisdiction both on appeal from, and error to, the Circuit Courts, where the only question involved was "due process of law" in obtaining service on foreign corporations not doing business in the State at the time of service.

Conley *vs.* Alkali Works, 190 U. S., 406.

Geer *vs.* Alkali Works, 190 U. S., 428.

II.

The next question presented is that of our right to attack, collaterally, the judgments of the County Court, and the decree of the District Court, of Ouray County, relied upon by the defendant in error. These judgments, and the decree, were rendered by superior courts of record, of the State of Colorado, whose territorial limits are coextensive with that of the Federal District of Colorado, and we have brought this action in the Federal Circuit Court for that district, and are attacking the judgments and decree, collaterally, by evidence outside the records as well as on account of matters appearing or failing to appear in the records.

The precise question was presented to this Court in the case of Cooper *vs.* Newell, 173 U. S., 555, 565, 568, 572, and it was held that such a judgment was a foreign judgment in the Federal courts, and could be attacked collaterally by extrinsic evidence.

See also Howard *vs.* de Cordova, 177 U. S., 609, 613.

It was not only proper for plaintiff in error to attack these judgments collaterally, but that was the only way in which, according to correct legal and equitable principles the attack could be made, and certainly the only way in which an attack could be made in the Federal Court.

Holland *vs.* Challen, 110 U. S., 15, 25.

McConnihay *vs.* Wright, 121 U. S., 201, 206.

III.

Plaintiff in error contends that the judgments rendered by the County Court of Ouray County, in the actions brought against it by The A. W. Begole Mercantile Company, John Ashenfelter and P. H. Fennell were void for lack of jurisdiction over plaintiff in error.

The first position taken by plaintiff in error, in making this contention, is that these judgments were in personam notwithstanding the attachments; that, if in personam, they were void:

(*a*) Because the records fail to show, affirmatively, that plaintiff in error, a foreign corporation, was doing business in Colorado at the time process was served, and that if it be conceded that the allegation "with its principal office in the State of Colorado, at the City of Ouray, in said Ouray County," was sufficient to show, prima facie, the presence of plaintiff in error in the State, the allegation is disproved by the returns of the officers in the records and by the evidence in the case at bar.

(*b*) Because the records show, affirmatively, that process was served, upon a person as agent of plaintiff in error, outside the county where the suit was brought; and

(*c*) Because the records fail to show, affirmatively, that J. M. Jardine, upon whom service of process was made as the agent of plaintiff in error, was an agent of such character as to authorize such service, and proof of the character of such agent cannot be made by evidence outside the record.

The second position taken by plaintiff in error is that, conceding the judgments to have been in rem, they were, nevertheless, void:

(*a*) Because the records show affirmatively that the statutes of Colorado, providing for service of process in actions in rem, were not compiled with, and leave no room for any presumption in favor of due service and

(*b*) Because, under the laws of Colorado, the court did not obtain jurisdiction to render a judgment or to condemn and sell the property by the mere levy of the writ of attachment, legal service of the summons and writ of attachment being necessary to confer this jurisdiction.

The third position, taken by plaintiff in error, is that these judgments were void, because J. M. Jardine was not the agent of plaintiff in error, when service was made upon him and that due notice was given of that fact before any judgment was entered.

1. The judgments were in personam. In all these attachment cases in the County Court of Ouray County, the

only service attempted was the service upon J. M. Jardine as the agent of plaintiff in error. This was purely personal service within the State.

In determining, from the nature of the service whether the action is an action in rem or an action personam, the rule may be stated thus: That if the service be personal within the State the action is in personam whether the defendant appears or not, if the service be by publication, and the defendant appears, the action is in personam; if the service is by publication, or other constructive service, and the defendant fails to appear, the action is in rem or quasi in rem and only affects property over which the court has acquired jurisdiction.

3 Am. and Eng. Enc. of Law, 2nd Ed., pp. 185–6.

In the case of Cooper *vs.* Reynolds, 10 Wallace, 309, Mr. Justice Miller says, on page 318, in discussing the distinction between actions in rem and actions in personam, where service had been made by publication:

"If the defendant appears the cause becomes merely a suit in personam with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant and *no service of process on him*, the case becomes in its essential nature a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff."

In the case of all of the judgments the process was served upon J. M. Jardine as an agent of this plaintiff. The actions were therefore begun and prosecuted to judgments as personal actions based upon such personal service. If the action is to be deemed in rem it must be prosecuted according to the law governing proceedings in rem.

Cooper *vs.* Newell, 173 U. S., 555, 572, *supra.*

Moreover, an examination of the records of these cases will show that both court and counsel treated the judg-

ments as judgments in personam, and that there was no attempt to render a judgment in rem, strictly so called.

After the time for answer had expired a regular default was entered, not against the property, but against the defendant company, and the judgments were rendered for the full amounts of the several plaintiffs' claims "including interest to date," together with costs of the action, and such judgments concluded with the sentence "for which judgment let special execution issue," showing conclusively that the executions were issued to satisfy judgments, against the defendant company, rendered upon service made on J. M. Jardine as agent of the company. (Folios 70-71, p. 36; Folios 75-76, pp. 39-40; Folios 67-68, p. 34.)

We cite the following authorities which hold that a judgment in an attachment case, which is based on personal service, is a judgment in personam:

Conn *vs.* Caldwell, 1 Gill. (6 Ill.), 531, 536.
Bowers *vs.* Town, 12 Mich., 229, 232.
Drake on Attachment, p 5, 7th Ed.

(*a*) If these judgments were in personam it is necessary for the records to show that the defendant foreign corporation was doing business in Colorado when the actions were brought and process served.

At common law, the State, and therefore its courts, had no jurisdiction over a foreign corporation to render a judgment in personam, for the reason that such a corporation was regarded as the mere creature of the State by which it was chartered, and to be without the power of migrating beyond the territorial limits of such State.

Clark *vs.* N. J. Steam Nav. Co., 1 Story, 531, 538.
Peckham *vs.* Haverhill, 16 Pick., 275, 286.
Middlebrook *vs.* S. F. Co., 14 Conn., 301, 305.

As corporations extended their business into other States, under interstate comity, the doctrine of the common law was found to work a hardship upon the citizens of such other States, and the right of the State to prescribe reason-

able terms upon which a foreign corporation could do business within its borders, was recognized at an early date. Among these terms was the condition that the corporation should be liable to be personally served with process while doing business in the State.

Railroad Co. *vs.* Kountz, 104 U. S., 5, 10.
N. E. M. Ins. Co. *vs.* Woodworth, 111 U.S.,138, 146.

Where there is no statutory provision authorizing a judgment in personam against a foreign corporation, no such judgment can be rendered against such corporation, although it is doing business in the State when its agent is personally served with process, and where there is such a statutory provision the terms of the statute must be strictly followed.

Andrews *vs.* Cent. R. R. Co , 99 Mass., 534, 535.
Desper *vs.* Cont. W. M. Co., 137 Mass., 252, 253.
Hartford F. Ins. Co. *vs.* Owens, 30 Mich , 441, 444.
M.B.& I.Works *vs.* Circuit Judge, 73 Mich., 155,157.

The jurisdiction exercised over foreign corporations, even by courts of superior jurisdiction, is therefore purely statutory, and the presumptions that ordinarily exist in favor of the judgments of superior courts of general jurisdiction are not indulged in, when the defendant is a foreign corporation; but the facts conferring such jurisdiction must appear affirmatively from the record.

The case of St. Clair *vs.* Cox, 106 U. S., 350, is a leading case upon this subject. In that case the plaintiff brought suit against the defendants in the Circuit Court of the United States for the Eastern District of Michigan, upon promissory notes that had been assigned to the plaintiff by the Winthrop Mining Company, an Illinois corporation. The defense made was that the notes had been assigned after maturity and were therefore subject to a set off by reason of a judgment, obtained by the defendants, against the Winthrop Mining Company in the Circuit Court of Marquette County, Michigan. There had been an attachment of property in the case in the State court, and it ap-

peared that the Michigan statutes in reference to service in attachment cases had be complied with, and no question was raised as the validity of the judgment in rem, but the objection to the use of the judgment in set off, as a judgment in personam, was sustained on the ground that it did not appear that the Winthrop Mining Company was doing business in Michigan at the time service was made in the action in the State court. The case was brought to this court on error, and the only error assigned was the ruling of the court below in excluding the record of the judgment in the State court. This court held, that in order to entitle the record to admission in evidence, it must appear *affirmatively from the record*, that the foreign corporation was doing business in the State at the time of service of process; and says, on pp. 359 and 360.

"Without considering whether authorizing service of a writ of attachment as a summons on some of the persons named in the statute, a member, for instance, of the foreign corporation, that is a mere stockholder, is not a departure from the principle of natural justice mentioned in Lafayette Insurance Company *vs.* French, 18 How., 404, which forbids condemnation without citation. It is sufficient to observe that we are of the opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court, to render a personal judgment, that it should appear somewhere in the record, either in the application for the writ or accompanying its service, or in the pleadings or the findings of the court, that the corporation was engaged in business in the State. The transaction of business by the corporation in the State, general or special, appearing a certificate of service by the proper officer on a person who is its agent there, would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another State, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employe, or to a particular transaction, or that his agency had ceased when the matter in said suit arose.

"In the record, a copy of which was offered in evidence in this case, there was nothing to show, so far as we can see, that The Winthrop Mining Company was engaged in business in the State *when service was made on Colwell.* The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the State court, gave no information on the subject. It did not therefore, appear, even prima facie, that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the Court jurisdiction to render a personal judgment against a foreign corporation. The record was therefore properly excluded."

The case of St. Clair *vs.* Cox, supra, is followed by the Circuit Court of the United States for the Southern District E. D. of Ohio, in the case of United States *vs.* American Bell Telephone Company *et al.*, 29 Fed., 17, 33-36. In that case it appeared from the return of the officer, inferentially at least, that the American Bell Telephone Company, a Massachusetts corporation, was doing business in the District, as a partner and through the agency of a local telephone company, and shows a service upon the president of the local company. To this return The American Bell Telephone Company interposed both a motion to quash and a plea in abatement. In sustaining both the motion and the plea, on the ground that the return failed to show compliance with the Ohio statute, and the return stated the conclusions of the officer rather than what had been done under the writ, on page 33, Jackson, J., says:

"No presumptions are to be indulged in favor of such a return, so as to give the Court jurisdiction over non-resident corporations.

"Alexandria vs. Fairfax, 95 U. S., 780.

"Grace *vs.* American Insurance Company, 109 U. S., 283. * * *

"Our conclusion, therefore, is that, under the allegations of the bill, the statements of the subpœnas, and the recitals of the returns, no valid or legal personal or con-

structive service on the American Bell Telephone Company is affirmatively shown such as will require it to appear and make defense herein, or suffer the consequence of a default; and that said company's motion to quash said service for defects or insufficiency in law or illegality appearing on the face of the returns should be sustained."

And again pp. 34 and 35;

"Without undertaking to review the authorities on the subject of a corporation's liability to suit in a State or district other than that of its creation, we think the decisions of the Supreme Court have settled and established the proposition that, in the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the Federal court jurisdiction in personam over a corporation created without the territorial limits of the State in which the court is held, viz: (1), It must appear as a matter of fact that the corporation is carrying on its business in such foreign State or district; (2) That such business is transacted or managed by some agent or officer appointed by and representing the corporation in such State; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition, express or implied, of doing business in the State."

And again on pages 35 and 36:

"It cannot be held sufficient to give this court jurisdiction in personam over a corporation that it has property rights, however extensive, within the district, or that it has pecuniary interests, however valuable, in business managed and conducted by others. It must itself be carrying on business in its own right, on its own responsibility, and for its own account, and through or by means of its own agents, officers or representatives, in order to bring it within the operation of the laws of a State other than that in which it is incorporated, making it amenable to suits there, as a condition of its doing business in such State."

The case of Henning *vs.* Planters Ins. Co., 58 Fed., 440, 441, 444, is a decision by the United States Circuit Court for the Western District of Tennessee and follows St. Clair *vs.* Cox, supra, in holding that the averment of "doing

business" is jurisdictional and must appear affirmatively from the record itself." In that case suit was brought upon an Illinois judgment that failed to show the averment, and the court held the judgment inadmissible in evidence for that reason.

Moreover, under the statute of Colorado which authorizes service upon a foreign corporation, it is necessary for the records to show that the corporation was doing business in Colorado at the time of service. The only statute in Colorado that permits service upon a foreign corporation, through its agents, in any kind of an action, is Section 38 Mill's Annotated Code, subdivision ninth, which reads as follows:—

"A summons shall be served as follows:—

"NINTH. If the action be against a foreign corporation or joint stock company or association, organized under the laws of another State or territory *and doing business within this State*, the summons shall be served by delivering a copy to any agent of such corporation, company or association, *found within the county*, in which the action is brought, if no such agent be found in such county, then by delivering a copy of the summons to any stockholder who *may be found in the county*."

The phrase "and doing business within this State," in the above statute has been interpreted by the United States Circuit Court of Appeals for the Eighth Circuit in the case of Rust *vs.* Water Works Co. 70 Fed., 129. Rust was receiver for The American Water Works Company, a New Jersey corporation. Judgment had been obtained against the corporation in the United States Circuit Court for the District of Colorado, by the United Water Works Company, based upon service made in Denver upon one Venner, vice president of the American Water Works Company. Rust sought to have this judgment set aside upon the ground, among others, that The American Water Works Company was not doing business in Colorado at the time Venner was served. This was refused by the Circuit Court

but the Circuit Court of Appeals held, in construing Section 38. subdivision ninth, supra, that the judgment was void, for that reason, saying on pages 135 and 136:

* * * "The latter (meaning American Water Works Company) complied with the statute of Colorado relative to foreign corporations by filing with the proper authorities of that State its certificate of incorporation, a copy of the laws of New Jersey, under which it was incorporated. and a certificate that its principal place of business in Colorado would be at Denver, in that State. and that a certain resident of Colorado was designated as its agent to receive service of process for it."

And again on page 137:

"Moreover, the service of the summons in this section on C. H. Venner, the vice president and stockholder of The American Water Works Company, was insufficient to give the court below jurisdiction to enter judgment against it in a personal action. The statute under which this service was made reads (Sec. 38, subdivision 9, supra, quoted) but the record discloses the fact that The American Water Works Company was not at the time of the attempted service on Venner, and had not been doing business in Colorado for many months, *so that the authority to serve summons on this corporation was not given by this statute.*"

It was, however, held by the court below that the allegation that plaintiff in error was a foreign corporation "with its principal office in the State of Colorado in Ouray in said Ouray County" was sufficient to show the presence of plaintiff in error in the State. (Folio 153.) Undoubtedly if the allegation meant that plaintiff in error was actually maintaining a principal office at Ouray, the ruling of the court below would be correct, but if the allegation be read in the light of the returns of the officers and also in the light of Section 499 Mills' Annotated Statutes, a different construction, we submit, should be placed upon it. This statute reads as follows:

"Foreign corporations, shall, before they are authorized or permitted to do business in this State, make and file a

certificate signed by the president and secretary of such corporation, duly acknowledged, with the secretary of state and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State and an authorized agent or agents in this State residing at its principal place of business, upon whom process may be served."

The allegation simply meant that the Cosmopolitan Mining Company had designated Ouray as the place of its principal office in compliance with Section 499 of Mills' Annotated Statutes, quoted above, and could have no other effect than to show that the defendant corporation had, at some time, complied, at least in part, with the requirements of the law permitting it to do business in the State. The return of the officer upon the writ of attachment in the Begole case shows that he was unable to find any one in Ouray County upon whom process might be served (Folio 75, p. 39); the records in the other cases show no attempt to make service in Ouray County, and the return of the sheriff of San Miguel County shows affirmatively that the party served as plaintiff in error's agent was not found or served within the county where it is alleged to have had its office. (Folios 110, 112, 123, 124, 136, 138, 150.)

These returns are hardly consistent with the idea that the defendant company was maintaining a principal office at Ouray at the time the sheriffs held the process papers, but if the allegation is read in the light of the statute it is perfectly consistent with the returns of the officers.

However, assuming that the allegation was sufficient to show, prima facie, that plaintiff in error was maintaining a principal office in Ouray, and that therefore the records were, so far as this point is concerned, admissible in evidence, then we submit that the uncontradicted testimony of the witnesses, William Story and Maurice Corbett, the sheriff of Ouray County, shows that, as a matter of fact, we had no office there. Mr. Story, who was Mr. Walsh's at-

torney in the suit to quiet title, testified that plaintiff in error had designated J. M. Jardine as its agent; that he never saw an office of plaintiff in error in Ouray County at any time, but that Mr. Jardine was its representative and that fact constituted what was known as the office of Cosmopolitan Mining Company. He further testified that in April, May and June, 1895, the time when these county court cases were brought, Mr. Jardine was not at Ouray but was employed in The First National Bank of Telluride of which he (Story) was president. (Folios 171, 172, 173, 174).

Maurice Corbett, the sheriff of Ouray County, at the time these actions were brought, testified that plaintiff in error had no office there and never had had an office there that he knew of. (Folio 178). We submit that this evidence, being uncontradicted, should have been sufficient to overcome the allegation that plaintiff in error was a foreign corporation with its principal office at Ouray, even conceding that the construction placed upon it by the court below was correct, and especially when the evidence is considered in connection with the returns of the officers.

If it was not deemed sufficient to support our motion for a direct verdict, it should, at least be sufficient to enable us to go to the jury and prevent a directed verdict against us, so far as these county court cases are concerned.

(*b.*) Plaintiff in error takes the position that the county court judgments were void for lack of jurisdiction and inadmissible in evidence for the further reason that it appears affirmatively from the records that summons was served in San Miguel County and not in Ouray County where the actions were brought. The original process of the courts in Colorado, does not run outside the county when the action is brought against a foreign corporation.

Section 38, Subdivision Ninth, of the Colorado Code, supra, provides that the summons may be served on any agent of a foreign corporation *found in the county where the suit is brought, and if* no agent can be *found in the*

county, then it may be served upon any stockholder *found in such county.*

We think that in connection with this code provision the court's attention should be called again to the following language in Section 499 Mills' Ann. Stats., viz:

"Foreign corporations shall * * * make and file a certificate * * * designating the principal place where the business of such corporation shall be carried on in this State and an authorized agent or agents in this State *residing at its principal place of business upon whom process may be served.*"

From these statutes it is manifest that the legislature of Colorado was not wholly unmindful of its obligations to provide for the giving of reasonable notice to foreign corporations of actions commenced against them, and that, in its wisdom, it thought such reasonable notice would be given by requiring that, in the case of a statutory agent the suit should be instituted and the process served in the county where the principal business of the corporation was carried on in the State, and that, in the case of another agent, the suit should be instituted and the process served in the county of the residence of such other agent.

Mills' Ann. Code, Sec. 38, Subdivision Ninth, supra, is mandatory; it requires the service to be made upon an agent "found in the county," or if no agent is "found in the county" then upon a stockholder "found in the county" thus using the expression "found in the county" in three different places.

There would be no question that our contention is right if it were not for Section 38b of the Colorado Code, which reads as follows, viz:

"Sec. 38b. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed; but nothing herein contained shall be held to repeal any provision of law, now in force which authorizes or permits a summons to be served in any other county of the State; than that in which the action is brought." (L. '91, p. 83, Sec. 3, Amending Code 1887, Sec. 38.)

We submit, however, that if Section 38b, supra, be read in the light of the laws of Colorado upon the subject of the service of process, that it will plainly appear that it it was not intended to apply to Section 38, paragraph ninth of the Code, supra. It was enacted contemporaneously with Section 38, and if held to apply thereto, would contradict it in practically the only change made by Section 38 in the law as it existed prior to the enactment thereof.

Mills' Ann. Code, Section 38, supra, was enacted by Session Laws of 1891, pages 81–83, and it amended Section 38 of the Code of 1887, Session Laws of 1887, pages 106–7. The provision of the statute amended corresponding to the provisions of the statute under consideration were:

"Section 38. A summons shall be served except as otherwise provided by law as follows: * * * If the suit be against a foreign corporation * * * service shall be made by delivering a copy of the writ to an *agent*, cashier, treasurer or secretary thereof; in the absence of such *agent*, cashier, treasurer or secretary, to any stockholder."

Both the old law and the new law permitted and permit, that service might or may be made upon any *agent* of the corporation, the old law permitted the service to be made upon such *agent* if he were found in the State, and the new law permits the service to be made upon such agent only if found in the county. The old law permitted service to be made upon a stockholder found in the State only in case an agent could not be found in the State, and the new law permits service to be made upon a stockholder only in case the stockholder is found in the county of the action and no agent is found in the county of the action.

When the old law and the new law are thus compared it becomes apparent that the change, and the only change, which the legislature of Colorado sought to effect, in enacting the new law, was to limit the former power of the courts to issue their process to any county in the State, and

to require that such process should be issued to, and be served in, the county in which the action was brought and in no other county.

The law enacting the present Code of Colorado has the following title:

"AN ACT

(For an act) to provide a code of procedure in civil actions for courts of record in the State of Colorado, and to repeal all acts inconsistent therewith." Mills' Ann. Code page 1.

While the code thus provides a code of procedure for all civil actions in courts of record of the State, nevertheless, the following important topics are within the jurisdiction of such court and are not mentioned by the code, but are the subject-matters of other statutory provisions, viz: Eminent domain, Mills' Ann. Stat., Chap. 45; forcible entry and unlawful detainer, Ibid, chap. 53; irrigation and the adjudication of priorities of water rights. Ibid, chap. 69; partition, Ibid, chap. 94; appointment of guardians and the administration and sale of the real and personal estate of minors, Ibid, chap. 59; appointment of conservators and administration and sale of the real and personal estate of insane persons, Ibid, chap. 80; probate of wills and the administration and sale of the estates of deceased persons, Ibid, chap. 131; divorce and alimony, Session Laws of 1893, chap. 80.

The special laws on all these different topics provided for the service of summons, citations and other process in a manner differing from the manner in which Section 38 of the Code of 1887 provided for the service of summons in ordinary civil cases, and it was this different manner of service to which the legislature of 1887 referred in the exception "except as otherwise provided by law," to be found in Section 38b of the Code of that year.

The special laws on all these different topics now provide for service of summons, citations and other process, in a

manner differing from the manner in which Section 38 of the Session Laws of 1891 provides for the service of summons in ordinary civil cases, and they also provide for service of summons, citation and other process in such cases in other counties than the county in which the action was brought. It was, therefore, the purpose, and the only purpose, of the legislature of 1891 in enacting the saving clause to the present law, viz: Mills' Ann. Code, Sec. 38b, supra, to provide that the special laws on these different topics should not be held to be repealed in so far as they provide for the service of summons, citation and other process, in other counties than the county of the action, although, under like circumstances, a summons in an ordinary civil action could not be served in such other county.

To give the saving clause of the present law any different meaning or to construe it as in any manner affecting the provisions of Subdivision Ninth, which requires service to be made in the county of the action, would nullify the only purpose sought to be accomplished by the legislature of 1891 in enacting that subdivision, and such a construction of this saving clause would make it repugnant to, and inconsistent with, an express and positive provision of the act.

The construction we contend for has been put upon Section 38, Subdivision Ninth, by the Court of Appeals of the State of Colorado in the case of

Venner *vs.* the A. U. W. Co., 15 Colo. App., 495, 499, 504, 505, 506.

In this case the process was served in the county of the action, but the defect in the return of the sheriff was, that it did not show that the process was served upon an agent of the corporation found in the county, or that no such agent of the corporation was to be found in the county and, that therefore it was served upon a stockholder of the corporation found in the county, and because of this defect

the judgment was held to be void for want of jurisdiction in the trial court over the person of the defendant.

The court had under consideration a judgment rendered in pursuance of service shown by the following return:

"By delivering a copy thereof to Clarence H. Venner, vice president of The American Water Works Company, at Denver, in the county aforesaid, on November 5, 1892." P. 499.

After calling attention to the provisions of the statutes of the State, in regard to the designating of the statutory agents, and to the Subdivision Ninth of Section 38 of the Code, the court says:

"The American Water Works Company was a foreign corporation doing business in this State. It was organized under the laws of New Jersey. Service of summons could, therefore, be made upon it only by the delivery of a copy of the writ to an agent of the corporation *found in the county of the suit*, or to a stockholder *in that county*, if such agent could *not be found*. In this case as shown by the return, the service was made upon Venner, not as a stockholder but as vice president, and the return did not show that no agent of the corporation could be found in Arapahoe County. It is only in the event that no agent is found in the county that service may be had upon a stockholder. * * * Venner may or may not have been a stockholder * * * but if the service had been upon Venner as a stockholder the court would still have had no jurisdiction of The American Water Works Company, there could be no service upon a stockholder, except upon a failure to find an agent *in the county*. In a suit against a foreign corporation, service *must* be made upon it by delivering a copy of the summons to its agent *found within the county where the action is brought;* and it is only in case such agent is not found within the county that substituted service is valid. Service upon a stockholder, unless there is a failure to find the agent, is a nullity. The return of service is not aided by presumption. And, to give the court jurisdiction where the service is had upon a stockholder, the return must show that no agent of the corporation could be found within the county. * * * For

aught that it indicates, the proper agent of the company may readily have been found in the county * * * jurisdiction of the person of a defendant, if there is no appearance by him, depends upon the service of the summons and the fact and manner of the service must be stated in the return. It appears from the return that there was no legal service of summons upon the American Water Works Company, it also appears from the record that no appearance to the action was made by that company; hence it was not within the jurisdiction of the court, and the judgment was, as to it, a nullity." pp. 504, 505, 506.

If there had been any occasion for construing the plain terms of this provision of the Colorado Code in reference to service upon foreign corporations the above decision has construed that provision to mean, that the service whether upon an agent or upon a stockholder of the corporation must be made in the county in which the action is brought, that the return of the officer must show either, that the process was served upon an agent of the corporation found in such county, or that no such agent could be found in such county and the service was therefore upon a stockholder of the corporation found in such county, and that where the return fails to show such a service the trial court acquires no jurisdiction over the person of the defendant, and its judgment is a nullity. The court will note that the records under consideration fail to show any attempt to serve summons in Ouray County, or that the sheriff of Ouray County ever had a summons in his hands.

This decision ought to establish the invalidity of all the county court cases for the reason that, while the Court of Appeals is not the highest court in the State, nevertheless, it is a court having an appellate jurisdiction which is not only extensive but which is in most cases exclusive of the Supreme Court itself, and for the further reason that the decision shows great care, thought and learning.

The jurisdiction of the Colorado Court of Appeals is set out in Section 406d, Mills' Ann. Code, which reads as follows:

"Sec. 406d. The Court of Appeals shall have jurisdiction:

First. To review the final judgments of inferior courts of record in all civil cases and in all criminal cases not capital.

Second. It shall have final jurisdiction, subject to the limitations stated in subdivision three of this section, where the judgment, or in replevin the value found is two thousand five hundred dollars or less, exclusive of costs.

Third. It shall have jurisdiction not final in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the constitution of the State or of the United States is necessary to the decision of the case; also, in criminal cases, or upon writs of error to the judgments of county courts. Writs of error from or appeals to the Court of Appeals shall lie to review final judgments within the same time and in the same manner as is now or may hereafter be provided by law for such review by the Supreme Court." (L. '91, pages 119-20, Sec. 4).

Service of process outside of the county where the process of the particular court "runs" is not a mere irregularity, but a fatal defect, which prevents the court from acquiring jurisdiction and a defect therefore of which advantage may be taken, not only upon a motion to quash the service or upon appeal or error to reverse the judgment, but also in any subsequent action in which the plaintiff seeks to use or to justify under his judgment, for here, according to the law of the State, the process of that court has no force or effect and is entitled to no respect, as, according to interstate and international law, it would have no force or effect and would be entitled to no respect if served in a foreign State or country.

There is a special reason for strictly enforcing this rule in a case, like the present one, where the court which rendered the judgments in question would have no jurisdiction over the defendant at the common law, and where the validity of its judgment depends, therefore, upon the statute and a compliance with the terms of the statute.

In the case of Mason's Frat. Ass'n *vs.* Riley, 60 Ark., 578, service was made upon a foreign insurance company by serving the Auditor of the State in another county than that of the suit, while the Statute of Arkansas provided that suit must be brought in the county where the defendant resided or was served, and the court held the judgment rendered by default void for lack of jurisdiction, saying, on page 581:

"The appellant was a foreign insurance company having no residence or agent in Jefferson County and was summoned in Pulaski County to appear in the Jefferson County Circuit Court. By the service of the summons in this case upon the auditor in Pulaski County requiring appellant to answer in the Circuit Court in Jefferson County, that court acquired no jurisdiction of said appellant and for want of such jurisdiction the judgment by default is void."

See also Auditor *vs.* Davies, 4 Ark., 494, 503.
Ford *vs.* Adams, 54 Ark., 137, 139, 140.
S. B. & L. Ass'n *vs.* Hallum, 59 Ark., 583, 586, 587.

The case of Sanchez *vs.* Haynes, 35 Fla., 619, was that of a service made upon the defendant outside of the county of the suit, where the record did not disclose that the suit affected property, or was based upon a cause of action which accrued in the county where the suit was brought; the Statute in Florida, in all other cases requiring the suit to be brought where the defendant resided or was served. The Supreme Court of Florida held the judgment void, saying, on page 625:

"Under the circumstances there was no authority for the bringing of such suit in St. John's County, and no right accrued to the plaintiff under said act of 1887 to send his process out from that county and to have it served upon the sole defendant in another county. The service made upon the defendant under these circumstances was a nullity, and the Circuit Court of St. John's County did not thereby acquire jurisdiction over the person of the defendant so as to authorize the entry of either a default or final judgment against him."

In the case of Christian *vs.* Miller, 111 Mo., 429, there were two defendants who were residents of Randolph County. The plantiff resided in the City and County of St Louis, brought the suit there and served one of the defendants there. The other defendant was served in Randolph County, but the court held that, in the absence of statutory authority allowing this latter service, the court acquired no jurisdiction over the second defendant, saying on page 436:

"It will readily be seen from these provisions that where a defendant is "found" in a county where a plaintiff resides, and is thereupon served with process, that there exists no statutory authority for the issuance of another writ to the county of the defendant's residence for service upon another defendant in the same action. It results from this ~~action~~ of statutory authority that the service of process on Davis, conferred no jurisdiction on the Circuit Court of the City of St. Louis over the person of that defendant."

See also U. S. M. A. Ins. Co., *vs.* Reisinger, 43 Mo. App., 571, 576.

The authorities holding that, where a service is made outside the county where the suit is brought, either contrary to the statute, or without statutory authority, the service is void and leaves the court without jurisdiction, are numerous and unanimous.

Slatton *vs.* Johnson, 4 Hayes (Tenn.), 197, 198.
Brown *vs.* Bridge Co., 23 Ore., 7, 8.
Walker *vs.* Stevens, 52 Neb., 653, 655.
Bowen *vs.* School Dist., 10 Neb., 265, 268.
Leake *vs.* Gallogly, 34 Neb., 857, 858.
Green *vs.* Oneida Co., Pleas., 10 Wend., 592, 593.
Conor *vs.* Hilton, 66 Howard Pr., 144, 146.
Dennison *vs.* Smith, 33 Mich., 154, 157-8.
Hartford Ins. Co., *vs.* Owen, 30 Mich., 440, 444.
Hebel *vs.* Amazon Ins. Co., 33 Mich., 400, 407.
Allison *vs.* Circuit Judge, 104 Mich., 140, 142, 145-7.
Ruby *vs.* Grace, 63 Ky. (2 Div.), 540, 541-2.
Dyas *vs.* Lindsay, 67 Ky., 340, 350, 352.
Commissioner *vs.* Rush (Kan.), 24 Pac., 484-6.
Wells *vs.* Patton, 50 Kan., 732, 736.

If our position upon this point is correct, then these judgments were void for lack of jurisdiction over the plaintiff in error, and inadmissible in evidence, even assuming that plaintiff in error had an office at Ouray and that J. M. Jardine was its agent.

(*c*) Plaintiff in error contends that these County Court judgments were void for lack of jurisdiction and therefore inadmissible in evidence, for still another cause, and that is for the reason that the records fail to show that J. M. Jardine, upon whom process was served, was an agent of such a character as to authorize service upon him.

Section 38, Paragraph Nine of the Colorado Code, supra, provides that process may be served "on any agent of a foreign corporation." The returns of the officer in all of these attachment cases, show that process was served upon "J. M. Jardine, the duly authorized agent" of plaintiff in error.

It will be seen that the return of the officer shows service upon an agent of some kind. If, therefore, the expression "any agent" in the statute is to be understood and enforced literally, our position upon this point must be wrong.

If, on the other hand, notwithstanding the peculiarities of the Colorado statute, the agent upon whom process is served must represent his principal in such a way that notice to the agent is to be deemed "due notice" to his principal and if this fact must appear affirmatively from the record, these requirements are not satisfied by the statement of the sheriff that J. M. Jardine was the "duly authorized agent" of the defendant, this statement being a mere legal conclusion and constituting the opinion of a ministerial officer upon a number of intricate questions of law.

Hence if Mills' Ann. Code, Section 38, subdivision ninth, were to be taken in its literal sense, process might be served upon any person answering the description of the agent of the corporation, no matter what might be

the domicile or the character of the duties of such agent, it might be served upon an agent whose domicile was, and whose duties were, to be performed in another State, and who happened to be served while in the State of Colorado, not on any business of the corporation, but for purposes of his own, or upon some business wholly unconnected with the corporation.

Hence, also, if this subdivision could be so understood, process might be served upon an inferior agent or upon an employe of the corporation, and the corporation which had been organized in another State, but which was doing business and had made large investments in the State of Colorado, might be subjected to a judgment in one of the State or Federal Courts, which would force it into bankruptcy or deprive it of the right to prosecute its business in the State, where the only service of process was made upon one of the caretakers or custodians of its property, or upon some other inferior or temporary agent not having charge of its business, and a judgment rendered in pursuance of such service would be as valid as if rendered in pursuance of service of process upon its designated statutory agent or upon one of its officers or superior agents.

The objectionable feature of this statute, viz., permitting service upon any kind of an agent, or even upon a stockholder, is so inconsistent with the universal principles of natural justice and international and interstate law, which provide for "due notice" before condemnation, that they render the whole statute void, or void pro tanto, in so far as this objectionable feature appears, because in contravention of the Fourteenth Amendment to the Federal Constitution.

Lafayette *vs.* French, 18 How. 404, 407.

St. Clair *vs.* Cox, 106 U. S., 350, 359, supra.

Goldy *vs.* Morning News, 156 U. S. 521, 525, supra.

C. M. L. Ins. Co. *vs.* Spratley, 172 U. S. 6, 9' 10, supra.

Conley vs. Mathieson Alkali Works, 190 U. S. 406, 411, supra.

Geer *vs.* Mathieson Alkali Works, 190 U. S. 428, 432, supra.

Four conditions must co-exist as matters of fact, in order to warrant a judgment in personam against a foreign corporation which is based upon the alleged default of the corporation:

First. There must be a constitutional State statute authorizing the judgment in personam.

Second. There must be a substantial compliance with the repuirements of the State statute when read in connection with the State and Federal constitutions.

Third. The corporation must have been doing business in the State at the time of the service of process, and

Fourth. The agent upon whom the process was served must have been an agent of such a character as to be presumed to have been authorized by the corporation to receive such service.

No one will contend that such a judgment would be valid if any one or more of the above-mentioned conditions did not exist as a matter of fact, and the non-existence of such condition or conditions in any way appeared when the judgment was offered in evidence in a subsequent action. The question, therefore, arises whether all or any one or more of such conditions must appear affirmatively, and, if so, how such condition or conditions must appear in such subsequent action.

It is unnecessary that the statute should appear from the record of the judgment, or otherwise be made to appear in the evidence, for such a statute is a public law of which, not only the State Courts, but also the Federal Courts in the State and this Court, when called upon to review the decisions of such State and Federal Courts, will take judicial cognizance.

This Court has held, in St. Clair *vs.* Cox, supra, that, in order to entitle such a judgment to be admitted in evidence in a subsequent action, the third of the above-mentioned

conditions, viz., that of "doing business," must appear affirmatively somewhere in the record of such judgment.

We submit that it has been shown that a personal action against a foreign corporation is statutory, and in derogation of the common law, and that, therefore, the facts constituting the jurisdiction must appear affirmatively from the record, and there is not an argument which can be advanced in support of the necessity of the rule in St. Clair *vs.* Cox, supra, requiring that there should appear in the record of such judgment one essential jurisdictional element, viz., the doing of business by the corporation in the State at the time of the service of the process, which cannot be advanced in support of the necessity that there should appear in such record the two other essential jurisdictional elements, viz., a substantial compliance with the requirements of the State statute when read in connection with the State and Federal constitutions, and authority from the corporation to the agent upon whom process is served to receive such service.

This question was presented by the record in St. Clair *vs.* Cox, supra, but it was not suggested by counsel or passed upon by this Court in that case, and it is believed that the question has never been presented to this Court for decision or decided by this Court in any other case.

This precise question has, however, been presented to and decided by quite a number of other courts, both State and Federal, and, as will be seen from the authorities next cited, these courts have all held that, in order to entitle such a judgment to be admitted in evidence in a subsequent action, process must be served upon the agent provided for by the statute, and such fact must appear from the record.

It is true that the statutes considered by the courts in the following cases differ from the Colorado statute in the respect that they provide that the service of process shall be made upon certain specified agents, while the Colorado statute provides, generally, that service be made upon "any agent" of the corporation "found in the county in which the action is brought," but if the Colorado statute is not

wholly unconstitutional and void, it is because it is to be read in connection with the Federal and State constitutions in regard to due process of law. The requirements, therefore, of these constitutional provisions, that the service be had upon a designated statutory agent of the corporation or upon some other agent, the character of whose agency is sufficient to warrant the inference that the notice to him is "due notice" to the corporation, must be considered as forming as much a part of the statute as if this language or language of similar import had actually appeared in the statute itself by the express enactment of the Legislature of the State.

In the case of Kienfke *vs.* The M. D. T. Co., 11 Fed., 282, the return failed to show that the person served was an agent in charge of an office or place of business of the defendant (a foreign corporation), as was required by statute. In sustaining a motion to quash the return, the United States Circuit Court for the Eastern District of Missouri says, on page 283 :

"The officer's return was: 'I return on this writ that I have served the same on the within named M. D. T. Co., a corporation, by delivering a copy of this writ to * * *, an agent of the aforesaid corporation * * * at said company's office, in St. Louis, in the above district, on March 4, 1882, * * *.'

"The return fails to state that the alleged agent of the defendant, a foreign or non-resident corporation, was an agent in charge of an office or place of business of defendant * * * the return being defective in that respect, the motion to quash is well taken."

In the case of the U. P. Ray Co. *vs.* Pillsbury, 29 Kansas, 652, Pillsbury had obtained judgment against the railway company, by default, where the return of the officers showed that service had been made upon an agent, without disclosing the character of his agency. The case was taken upon error to the Supreme Court, and, in holding the judgment invalid, Justice Brewer says, on page 653 :

"Two errors are alleged: First, that the record shows no service, and second * * *, both points, we think, are well taken. The return of the summons shows that it was served by delivering a copy thereof on D. W. March, agent of said U. P. R. R. Co., Manhattan, Kansas, where this was served, or what kind of an agent of said defendant the said D. W. March was, is not shown. Such service is insufficient * * * for aught that appears said March may have been an agent to purchase coal or to transact any temporary business on behalf of the company, with no office or residence in the county. The sections above referred to provide ample and easy means for service upon a railroad corporation, and before it can be adjudged in default, and subjected to a judgment upon default, *the record must affirmatively show* that, in some of the ways named in the statute, service has been made upon it."

The facts in the case of Kirby Carpenter Co. *vs.* Trombly, 101 Mich., 447, were as follows: The plaintiff was an Illinois corporation and replevied certain goods that had been levied upon by virtue of a judgment rendered by a Justice of the Peace against the plaintiff as garnishee. The validity of the judgment rendered by the Justice was attacked upon the ground that the return of the officer in that case gave the Justice no jurisdiction. In sustaining the action of replevin, on page 449, the court says :

"The return of the officer shows a service upon the defendant foreign corporation by delivering to Andy L. Robbins, the agent of said Kirby Carpenter Company, having charge of its affairs within said County of Iron, a copy thereof.* *It is true that the return in the present case shows that the agent Robbins had charge of the affairs of the company within said County of Iron, but it does not appear what was the nature of the affairs of the company within the county. For aught that appears the agent may have been a mere custodian of property without authority to control the affairs of the corporation in the matter of making contracts in the county. If the return had stated that the corporation was conducting business in the within county, and that such business was within the charge and control of the agent, it would doubtless have been sufficient. We think the Circuit

Judge was right in holding that the return was not sufficient to confer jurisdiction."

The following cases are also cited as sustaining the same doctrine:

"C. P. M. Co. *vs.* Bank, 86 Ill. 587, 589.
S. B. L. Ass'n *vs.* Hallum, 59 Ark. 583, 587.
Ill. & Miss. Tel. Co. *vs.* Kennedy, 24 Ill. 319.
Dickerson *vs.* B. & M. R. R. Co. 43 Kas. 702, 703.
Toledo Ice Co. *vs.* Munger (Mich.) 82 N. W. 663, 664.
Haley *vs.* H. & St. J. R. R. Co. 80 Mo. 112, 113, 114.

The rule announced in these cases excludes the idea that the character of the agent who is served with process can be shown otherwise than by the record, and for aught that appears in these County Court cases, Jardine may, to use the language of Mr. Justice Brewer, in U. P. Ry. Co. *vs.* Pillsbury, *supra*, "have been an agent to purchase coal or transact any temporory business on behalf of the company."

If our contention on this point is correct, these records should not have been admitted in evidence even if it be assumed that plaintiff in error had an office in Ouray; that Jardine was, in fact, its agent and that the service in San Miguel County instead of Ouray County was valid.

The defendant in error was, however, allowed to supplement the records, by introducing over our objection, copies of a resolution of plaintiff in error, by which J. M. Jardine was, some ten years before the bringing of the County Court cases, designated its process agent. These copies were certified by the Clerk and Recorder of Ouray County and by the Secretary of State of the State of Colorado. (Folios 64 to 67.)

The certificates were admitted provisionally with leave for plaintiff in error to renew its objection after defendant in error had introduced his evidence. The objection was not renewed because the court below had held that the authority of the agent would be presumed if the corporation

was present in the State and that the records were sufficient to show its presence. (Folio 97.)

That it was error in the court below to admit the certificates, we submit the following authorities will show:

The case of Montgomery *vs.* Merrill, 36 Mich. 97, 102, 104, appears to be directly in point.

This case was before the Supreme Court of Michigan on two former occasions as will be seen from 18 Mich. 338 and 25 Mich. 73.

On the last preceding occasion the record of a judgment against a domestic corporation was rejected, for the reason that the return of the officer did not state positively the facts that showed that the alleged agent of the corporation was an agent authorized under the statute to receive service of process, but stated the facts on information and belief, and without giving the grounds of such information and belief. 25 Mich. at 77.

The party relying upon the judgment had the return amended in an *exparte* proceeding and offered the amended return in the case reported in 36 Mich. The record was refused admission on the ground that the amendment had been unwarranted and, thereupon, the party relying upon the judgment, offered to prove by parol, the character of the agent upon whom service was had and was not permitted so to do. (See Page 102.)

In referring to this offer Mr. Chief Justice Cooley says, on page 103, of 36 Mich.:

"We think, also, that the Court was right in rejecting the evidence offered by the plaintiff in the trial to show that Sidney Ketcham was in fact the last President of the Bank. Jurisdictional facts cannot rest in parol, to be proved in one case and disproved, perhaps, in another. The record must be complete in itself."

On this point we cite Henning *vs.* Planters Ins. Co., 23 Fed. 442, supra.

The following cases are also cited in support of the general proposition, that records must prove themselves and

cannot be supplemented or modified by extrinsic evidence :

Cissel *vs.* Pulaski County, 10 Fed. 891, 893.

Rutherford *vs.* Crawford, 53 Ga. 43.

Holmes *vs.* Cole, 95 Mich. 272, 273.

Sullivan *vs.* Blackwell, 28 Miss. 737, 743.

Madison Bank *vs.* Sumanon, 79 Mo. 527, 531.

Anderson *vs.* Binford, 61 Tenn. (2 J. Baxter) 310, 314, 315.

2. Hitherto these judgments have been considered as in personam. Conceding, for the sake of the argument, that because writs of attachment were sued out in these cases, they were actions in rem, or quasi in rem, plaintiff in error still contends that the County Court of Ouray County was without jurisdiction to render a judgment therein or to condemn its property to be sold.

(*a*) The records show that no service of process was made upon the plaintiff in error in accordance with any statute of Colorado. If the service was made under Section 38, Subdivision Nine of the Code, supra, then the corporation must have been doing business in the State and the agent must be found in the county of the action whether the action be in personam or in rem. If the corporation is not doing business in the State, or if the agent cannot be found in the county, then service can be made by publication, as provided by Section 41 of Mills' Annotated Code, which, so far as pertinent, reads as follows :

"Sec. 41. Service by publication shall be allowed only after summons issued and return thereon made that the defendant, after diligent search, cannot be found. After such return, not less than ten days after issue of summons, publication shall be made by order of the clerk of the proper court, but shall be made only in cases of attachment, foreclosure, claims and delivery, or other proceedings where specific property is to be affected, or the procedure is such as is known as a proceeding in rem. After return is made as aforesaid, the case being such as hereinbefore mentioned, the plaintiff, or one of the plaintiffs, may file in the office of the proper clerk an affidavit stating that the defendant re-

sides out of the State, or has departed from the State without the intention of returning, or concealed himself to avoid the service of process, and giving his postoffice address, if known, or stating his postoffice address is not known to affiant, whereupon the order of publication shall be made by the clerk. The order shall direct the publication to be made in a public newspaper published in the county. Such publication shall be made at least once a week for four successive weeks. When the affidavit gives the postoffice address of the defendant, the clerk shall mail a copy of the summons, duly stamped, to the defendant, at such address forthwith. The service shall be completed at the expiration of ten days from the date of the last publication."

The records of these cases do not show that plaintiff in error was doing business in the State, and they do show that service was made upon its alleged agent outside the county of the action, and, in the Begole case, that no person could be found in the county of the action upon whom process could be served. In other words, they disclose a void personal service. It may, perhaps, be urged that where a court of superior jurisdiction, has jurisdiction over the *res*, and proceeds to condemn and sell the property, it will, in the silence of the record, be presumed to have acted in accordance with its authority so far as the *res* is concerned. This may be true when the record is silent, but where one kind of service is disclosed no other will be presumed.

The case of Galpin *vs.* Page, 18 Wallace, 350, is a leading one upon this point and in passing upon the question of the presumptions to be indulged in favor of a judgment rendered in the District Court of the City and County of San Francisco, upon which the defendant relied, and which judgment was alleged to be void for lack of proper service, this court says on page 366:

"Presumptions are only indulged in to supply the absence of evidence or averments respecting the facts presumed, they have no place for consideration when the evidence is disclosed or the averment is made. When therefore the record states or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth

on that point and it will not be presumed, that there was other or different evidence respecting the fact or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer or the proof of service contained in the record that the summons was served in a particular place and there is no averment of another service, it will not be presumed that the service was made at another and different place, or if it appear in like manner that the service was upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so it would never be possible to attack the judgment of a superior court collateraliy although the want of jurisdiction might be apparent upon its face—the answer to the attack would always be that notwithstanding the evidence, averments and necessary facts to support the judgment are presumed."

To the same effect are the following cases:

Godfrey *vs.* Valentine, 39 Minn. 336, 337.
Israel *vs.* Arthur, 7 Colo. 5, 8.
Settlemier *vs.* Sullivan, 97 U. S. 444, 449.
Newman *vs.* Crowls, 60 Fed. Rep. 220, 224.

Hence when the records show this void service under Section 38 Subdivision Ninth of the Code, it cannot be presumed that proper service was also made under Section 41 of the Code, supra, and in this vital respect the case at bar differs from the case of Cooper *vs.* Reynolds, 10 Wallace 309, which will be discussed in the next subdivision of the argument.

(*b*) In Colorado the Court does not acquire jurisdiction to render a judgment or to condemn and sell property by the mere levy of the writ of attachment. There must also be a valid service of summons and writ of attachment on the defendant.

We are aware of the fact that this Court has held, in the case of Cooper *vs.* Reynolds, 10 Wall. 309, supra, that, under the laws of Tennessee, the Court obtains jurisdiction over the property by its seizure in attachment, and even though the record fails to disclose a proper service of the

summons upon the defendant, the judgment will be sustained as a judgment in rem. It is true that the record in that case contained a finding by the Court that there had been due service of the notice in attachment upon the defendant by publication, but plaintiff in error understands the effect of the decision of this Court in that case to be that jurisdiction to render a judgment against the property was obtained by the levy of the attachment, even though it did not appear that the defendant had been served. This, however, is not the law in Colorado.

The statutes of that State prescribe, that, when real estate is attached, a copy of the writ of attachment must be filed with the clerk and recorder of the county where the real estate is situate, *and a copy of the writ must be served upon the defendant.*

Paragraph first of Section 104 of the Code reads as follows :

"First. Real property standing upon the records of the county in the name of the defendant, shall be attached by filing a copy of the writ together with a description of the property attached, with the recorder of the county."

Section 97 of the Code, so far as pertinent, reads as follows :

"The writ shall be directed to the sheriff of any county in which the property of such defendant may be *and require him to serve a copy of the writ on the defendant* and to attach and safely keep all of the property of such defendant within his county * * *"

Section 96 of the Code, in so far as it relates to the matter of service of process, reads as follows :

"The defendant *after the service of the writ of the attachment upon him or after he has due notice thereof, as hereinafter provided,* his agent or attorney, at any time within the time prescribed for answering, may, by affidavit, traverse and put in issue the matters alleged in the affidavit upon which the attachment is based. * * *"

"If the defendant fail to traverse the plaintiff's affidavit, the attachment shall be deemed sustained; but it shall not be

necessary to have an actual return of the writ before resorting to service by publication or to personal service out of the State, provided the other requisites of constructive service are complied with; the defendant shall also be deemed to have *due notice* of the attachment when he enters a general appearance, or shall be *personally or constructively served, as provided by this act.*"

From Mills' Ann. Code, Sec. 38, Sub. 9, and from the Code sections above mentioned it appears:

First. That the plaintiff is required to serve a writ of summons upon the defendant in order to advise the defendant of the fact that a suit has been instituted against him, and that there must be a valid personal, substituted or constructive service of this writ upon the defendant, in order to give the court jurisdiction to render a judgment in any kind of action.

Second. That where there is a personal service of the writ of summons, the plaintiff is required to serve a copy of the writ of attachment, not for the purpose of advising the defendant, that an action has been commenced against him, but for the purpose of advising him, that, in the action thus commenced against him, the plaintiff prays for an attachment of his property and thus enabling him to contest the right of the plaintiff to such attachment, whether he has, or has not, any grounds upon which to contest the right of the plaintiff to a judgment in the action.

Third. That there is no necessity for the service of the writ of attachment upon the defendant, where there is a service by publication of the writ of summons, and,

Fourth. That the purpose of the levy of the writ of attachment is not to give the court jurisdiction to render a judgment in the action, but to subject the property thus attached to a special execution in case such judgment is rendered and the attachment is sustained.

Not only do the statutes of Colorado require the service of process, but the Supreme Court of Colorado has held that the courts of that State have no jurisdiction to condemn and

sell property in attachment proceedings unless there is a valid service upon the defendant. We refer to the case of Great West Mining Company *vs.* Woodmas, of Alston Mining Company, 12 Colo. 46. The action was brought by the plaintiff to set aside sheriff's deeds, which had been made pursuant to two judgments rendered in attachment cases. One of the judgments was rendered by default on service made on one Purmort as the agent of the Great West Mining Company, and the other was rendered on like service and an appearance by one Gunyan, who assumed to act as its attorney. The Supreme Court of Colorado held the service bad; that notwithstanding the attachments the court had no jurisdiction to condemn and sell the property and that the sheriff's deeds were therefore void, saying, on pages 53 and 54:

"It was competent to show that the service of the writ and summons was not made upon a general agent of the defendant and that the entry of appearance by the attorney was unauthorized, and that no notice was given to the parties whose right was sought to be affected by such entry. It follows as a logical result of the propositions before discussed that a judgment rendered without service, or upon the unauthorized appearance of an attorney, is (whenever it is made to appear by proper proceedings instituted for this purpose), void, and that all sales, or other proceedings had thereunder are, as to all persons, irrespective of notice, or bona fides, absolutely nullities."

* * * "But absence of local service or authorized appearance is jurisdictional. Without jurisdiction, no judgment whatever will be entered nor rights acquired thereunder."

"The mere levy of an attachment did not give the Court jurisdiction to determine the question of indebtedness and condemn the attached property to pay the same."

And in referring to due process of law and the State and Federal constitutional provisions in regard to the same, the Court says, on page 55:

"The courts have uniformly held that this requirement demands that there shall be notice and hearing before con-

demnation. Any proceeding which violates these principles is not 'due process of law,' and is not according 'to the law of the land.'"

"Where the property of a citizen is taken and condemned without notice to him, it is entirely immaterial whether it be a special or general judgment, the fundamental wrong in such case being that his property is taken and conveyed to some other person without his knowledge."

Upon the petition for rehearing, the Court restates all of the foregoing propositions of law, page 56, and says: "And whatever rule may obtain in other localities upon the question of acquiring jurisdiction solely by the levy of the writ of attachment, we are of the opinion that, under our statute, there must be further notice and opportunity given for a hearing before condemnation." (Page 57.)

We refer also to the case of

Thomson *vs.* White, 25 Colo. 226, 230, 231, 233.

In this case there was service of summons and levy of the writ of attachment upon real property, but the provisions of the Code, Sections 97 and 104, requiring the service of a copy of the writ upon the defendant was not complied with. (Page 230.)

The Court quotes with approval from the 12 Colo. 46, and 12 Colo. 108, to the effect that the mere levy of the writ of attachment does not give the Court jurisdiction to determine the question of indebtedness and condemn the attached property to be sold, but that there must also be a proper service of the writ of summons and the writ of attachment (page 231). And the Court holds that in case of the want of service of the writ of attachment judgment must be reversed. (253.)

We understand that the Federal Courts will adopt the rule of construction which has been placed upon a statute by the Supreme Court of the State which has enacted the statute, but that this practice will not prevent the Federal Courts from holding that a statute enacted by a State, or the construction put upon such a statute by the courts of that

State, contravenes the Federal Constitution or the principles of natural justice or international law.

Nesmith *vs.* Sheldon, 7 How. 812, 817.
Bergman *vs.* Bly, 66 Fed. 40, 43.
Cheeley *vs.* Clayton, 110 U. S. 701, 707, 708.
Bucher *vs.* R. R. Co., 125 U. S. 555, 582, 583.
Detroit *vs.* Osborn, 135 U. S. 492, 498, 499.
Lumber Co. *vs.* Ott, 142 U. S. 622, 627, 628.
Bauserman *vs.* Blunt, 147 U. S. 647, 655.
May *vs.* Temny, 148 U. S. 60, 64.
Balkam *vs.* Iron Co., 154 U. S. 177, 188, 189.
Forsyth *vs.* Hammond, 166 U. S. 506, 518, 519.
Zeriga *vs.* Scott, 1 Woods, 496, 498.

Adopting construction of the State Court in regard to service by publication.

Guaranty Co. *vs.* R. R. 139 U. S. 137-148.

And substantially conclusive effect is given to such decisions upon the construction of State statutes as affecting the title to real estate within the State.

Bacon *vs.* Insurance Co. 131 U. S. 258, 264.
Gormley *vs.* Clark, 134 U. S. 338, 348.

The case of Cooper *vs.* Reynolds has been cited and explained in a number of subsequent cases and this court has, in a comparatively recent case, disavowed what appeared to be the semblance of dicta to the effect the jurisdiction to pronounce judgment is acquired by the actual seizure of the property attached or that defective or irregular affidavits and publication do not render a judgment void, and has held that a judgment in rem is not only void where there is no publication of the summons but also void where the statute in regard to publication has not been strictly followed, and void where the publication is not for the full term provided for by the statute.

Guarantee Trust Co. *vs.* Green Cove Ry. Co. 139 U. S. 137, 146, 147.
See also Pennoyer *vs.* Neff, 95 U. S. 714, 722.

Walker *vs.* Cottrell, 6 J. Baxt. (Tenn.) 258, 266.
Smith *vs.* Pomeroy, 2 Dillon 415, 420.
Dorr *vs.* Dorr, 82 Va. 359, 365.
Brown *vs.* Tucker, 7 Colo. 30, 36.

If the levy of the writ upon real property dispenses with the necessity for the service by publication of the summons or other process it must be on the ground that notice is inferable from the levy.

The purpose of levying the writ of attachment is not to give the defendant notice of the pendency of the suit, but to hold the property and prevent its alienation until the defendant has appeared or been notified to appear and there has been a trial, both as to the right of the plaintiff to a judgment and to have that judgment satisfied out of the property attached.

Notice of the pendency of the suit is inferable as a matter of fact from the actual manual seizure of personal property or the actual manual occupation of real property, because of the notoriety of these acts and of the probable prior possession of the defendant, by himself or his agent. No such notice is necessarily inferable, even as a matter of fact, from the levy of the writ upon real property, which is effected by the simple act of handing the writ and a memorandum of the levy to the recorder of deeds of the county where the property is situate, for there is nothing in such an act to call the defendant's attention to the fact, that a suit has been instituted against him and, notwithstanding such act, he might remain in possession of the property from the institution of the suit until it had gone to judgment and execution and until the time for appeal or writ of error had expired and be in ignorance of the whole affair.

This Court and the Supreme Courts of the great majority of the States, and all of the text writers have held that neither an actual manual seizure of personal property, nor an actual manual occupation of real property, to say nothing of a mere levy of a writ of attachment, is sufficient to give a Court jurisdiction to render a judgment, either in

proceedings in rem or quasi in rem, and that besides such seizure, occupation or levy, there must be a reasonable notice to the defendant.

Cooley Const. Lim. 403.
Waples on Attachment, 315.
Wade on Attachment, Sec. 6.
The Mary, 9 Cranch, 126, 143.
Galpin *vs.* Page, 18 Wall. 350, 360.
Freeman *vs.* Alderson, 119, U. S. 185, 199.
Hassall *vs.* Wilcox, 130 U. S. 493, 504.
Arndt *vs.* Griggs, 134 U. S. 316, 323.
Scott *vs.* McNeal, 154 U. S. 34, 50, 51.
Bradstreet *vs.* Insurance Co., 3 Sumner 600, 607.
Brown *vs.* Tucker, 7 Colo. 30, 35.
Great West Mining Co. vs. Woodmas of Alston Co., 12 Colo. 46, 53, 54, 55, 56, 57.
Raynolds *vs.* Ray, 12 Colo. 108, 115.
Thompson *vs.* White, 25 Colo. 226, 230, 235.
Haywood *vs.* Collins, *et al.*, 60 Ill. 328, 332, 333, 334, 336, 337, 340, 341.
Bradley *vs.* Jamison, 46 Iowa, 68.
Walworth *vs.* Stevenson, 24 La. An. 251, 252, 253.
Woolridge *vs.* Monteuse, 27 La. An. 79, 81, 82.
Clark *vs.* Bryan, 16 Md. 171, 176, 177.
King *vs.* Hannington, 14 Mich. 532, 541.
Woolkins *vs.* Haid, 49 Mich. 299, 301.
Nugent *vs.* Nugent, 70 Mich. 52, 56.
Morey *vs.* Morey, 27 Minn. 205, 266, 267.
Barber *vs.* Morris, 37 Minn. 194, 195, 196.
Brown *vs.* St. Paul & N. P. Ry. Co., 38 Minn. 506, 507, 508.
Godfrey *vs.* Valentine, 39 Minn. 336, 337, 338.
Edwards *vs.* Toomer, 22 Miss. (14 Sm. & M.), 75, 77, 78, 79, 80.
Westcott *vs.* Archer, 12 Neb. 345, 349.
Murphy *vs.* Lyons, 19 Neb. 689, 690, 693.
Woodruff *vs.* Taylor, 5 Washb. (20 Vt.), 65, 76, 77.
Anderson *vs.* Cobern, 27 Wis. 559, 562.

So whether the judgments in these attachment cases be considered in personam or in rem, their validity depends upon the validity of the service upon J. M. Jardine, and, in either case, under Sec. 38 of the Code, supra, the corpora-

tion must be doing business in the State in order to authorize such service, and the service must have been made in the county of the action. But the judgments were in personam. If the service on Jardine was valid the judgments were good anywhere and could be enforced in any State, which is not true of a judgment in rem.

3. These judgments were void for the further reason that the records show that J. M. Jardine was not the agent of plaintiff in error at the time of the service of process upon him, and the plaintiffs in those actions had notice of the fact before any judgment was taken.

We refer to the sworn statement of J. M. Jardine, filed in the case brought by The A. W. Begole Mercantile Company (Folios 162, 163), which is quoted in the statement of the case. It was excluded by the court below, and the objection to its admission seems to have been sustained upon the ground that there was nothing to show that the notice had actually been called to the attention of the plaintiffs in the attachment suits or the party purchasing at the sheriff's sale. (Folio 164, pp. 97, 98.) The notice was filed in the Begole case; Emerson & Bradshaw were the attorneys for the plaintiffs in that case (Folio 119, page 67) and must be presumed to know what was contained in the court files of a case which they were conducting. They were also attorneys for the plaintiffs in the Ashenfelter case (Folio 106, p. 58) and in the Fennell case (Folio 132, p. 77) and Ashenfelter and Fennell applied to be made parties plaintiff in the Begole case. Notice to Emerson and Bradshaw was, therefore, it would seem, notice to all of the plaintiffs in those proceedings. J. C. Marsh, trustee for the judgment creditors, was the purchaser at the sheriff's sale (Folio 128, p. 73), and he was the president of the A. W. Begole Mercantile Company (Folio 120, p. 68), the plaintiff in the case in which the notice was filed. Plaintiff in error cannot see how it can be successfully contended that any of the parties interested were ignorant of this notice. These facts were all in evidence at the time the notice was ex-

cluded and plaintiff in error did not, therefore, offer the notice again.

The notice was filed in the County Court of Ouray County on May 27, 1895. (Folio 163, p. 97.) Default and judgment were not entered in the Ashenfelter case until June 27, 1895 (Folio 67, p. 34); in the Begole case until June 27, 1895 (Folio 70, p. 36); and in the Fennell case until July 10, 1895 (Folio 75, p. 39). The notice was therefore filed at least one month before any judgment was taken. It was the proper way to give notice of the fact that his agency had ceased. The plaintiff has lost nothing by the mistake in service. He can still proceed by publication if he has the property under attachment. There can be no estoppel, as might be the case if he had changed his position in reliance upon the supposed agent's authority.

The case of Stock Exchange *vs.* Keyes, 67 Ill. App. 460, seems to be directly in point. In that case one Curtis had been served as agent of the defendant corporation. The defendant filed a plea to the jurisdiction on the ground that Curtis was not its agent and this question was tried to a jury, and the lower court instructed the jury, among other things, that if Curtis had been acting as such agent and was carrying on business in the same ostensible manner at the time of service and the defendant had never given notice to the plaintiff that Curtis' authority had ceased, that they should find for the plaintiff, and the Supreme Court, in holding this instruction erroneous, says on pages 462 and 463:

"Another instruction was as follows: 'The Court instructs the jury that if they believe from the evidence that F. C. Curtis was employed by the defendant to transact the business of the defendant at Carlinville, Illinois, as agent, prior to the service of the summons in this case, and that at the time of the service of the summons he was still transacting business in the same ostensible manner, and that prior to that time the defendant had given no notice to those transacting business with said Curtis that he had ceased to rep-

resent defendant in that business, then the jury should find for the plaintiff."

"It is not perceived why it was necessary for the defendant to give notice to those transacting business with Curtis that his relation with it had ceased *so far as the matter of service is concerned*. If he was not at the time of the service the agent of the defendant the service was bad. Possibly those who had been dealing with him as the agent might continue to deal with him in that capacity and in the way as formerly, and rely upon his agency until notified to the contrary. We say possibly this might be so, but if so it would be upon the ground that for some reason growing out of the particular circumstances the principal should be estopped to deny the agency. But how can such doctrine find application here ?"

"The officer could not insist upon the supposed estoppel if he never had any prior dealing with Curtis, and he was put in no other or different position than if he had never heard of the supposed agency; neither can the plaintiff, if he has not been misled. He has not changed his position because he supposed the agency was continued; he has parted with nothing and lost no right by reason of anything done by the defendant in that regard. This instruction was erroneous, and, in view of the testimony which tended to show that the relation of Curtis with defendant had ceased several days before service, was calculated to mislead the jury."

The Court will note that in the case quoted above, nothing had occurred that would indicate to the plaintiff that the agency of Curtis had ceased. The case at bar is much stronger, for the reason that the removal of Jardine from the County of Ouray was a fact that should have given plaintiffs notice that his agency had ceased, since the statute required him to be a resident of Ouray County, Section 499 Mills' Ann. Stats. quoted above. To the same effect we cite the case of San Pedro Cattle Co. *vs.* Williams, 36 Pac. 34.

The facts set forth in J. M. Jardine's notice are sworn to and are nowhere contradicted by the records in the attachment cases or by the record in the case at bar. The notice was a part of the record in the Begole case, and, as such,

should have been admitted when the rest of the record was in evidence.

Evidently for the purpose of destroying the effect of this notice, the defendant in error introduced in evidence, over the objection of plaintiff in error, those portions of the certificates of the recorder of Ouray County, and of the Secretary of State of Colorado, which show that Jardine's authority had never been revoked of record. (Folios 64, 65). We contend that this evidence was incompetent, immaterial and irrelevant, not only because it was offered for the purpose of supplementing the records by extrinsic evidence, but also because the laws of Colorado make no provision for the filing in any public office of the notice of resignation of a designated agent or the revocation of his authority, nor do they prescribe any other means of giving such notice. Such a notice would not be entitled to record, and, if recorded, would be notice to no one.

"Constructive notice from the record being dependent upon purely statutory provisions, it naturally follows that such effect will not be given to any and every recorded instrument, but only to such as fall within the statute. Therefore, if an instrument be not of a kind authorized by the law to be recorded * * * the record thereof will be a mere nullity, and will not operate to give constructive notice."—Am. and Eng. Enc., 2d ed., Vol. 24, p. 142, and the long line of cases cited in Note 3.

And, in the absence of a statute, no notice of a revocation of a designated agent's authority is required.

Forrest *vs.* Pittsburg Bridge Co. 116 Fed. 357.

IV.

Plaintiff in error further contends, that, even assuming the Begole, Ashenfelter and Fennell judgments to be valid and regular in every respect, the sheriff's sale and deed made thereunder was void and insufficient to divest plaintiff in error of its title to the property: (*a*) Because the sheriff did not follow the precept of the Court in making the sale,

and (*b*) Because the records show that the sale was made in order to satisfy the judgment obtained by William C. Fulton, as well as the other judgments, and this Fulton judgment was void, for lack of jurisdiction, beyond any question.

(*a*) The authority of a ministerial officer in making a judicial sale is derived from the writ, or precept, placed in his hands by the Court. Any substantial departure from the instructions contained in the writ renders the sale void. Now what are the proceedings of the sheriff in making this sale, under which the defendant in error claims that plaintiff in error lost its title? He receives a writ of special execution issued in the case brought by the A. W. Begole Mercantile Company, which commands him to make out of the property attached, or so much thereof as may be necessary, the sum of $226.09, and the further sum of $24.58 costs, and to have the money ready "for adjustment according to law, allowing the several judgment creditors in proportion to the amount of their several claims adjusted." (Folio 127.) What does the officer actually do under the writ? According to his return he makes, not the sum of $250.67, as commanded, but the sum of $1,616.97 (Folio 128). We think it is an elementary proposition of law that the officer has no authority to sell more property than is sufficient to make the amount mentioned in the writ, or to sell the property for an amount substantially exceeding that required by the writ.

> Patterson vs. Corneal, 3 A. K. Marshall (Ky.), 618, 619.
> Blakely *vs.* Albert, 1 Dana (Ky.), 185.
> Hastings *vs.* Johnson, 1 Nev. 613, 614.
> Lockwood *vs.* Sturtevant, 6 Conn. 373, 388.
> Adams *vs.* Morrison, 4 N. H. 166, 167, 168.

The property of plaintiff in error, sold at this sale, consisted of seven lode mining claims and five mill sites and was perfectly susceptible of division. It brought the sum of $1,616.97 and it seems to be a mathematical certainty

that it would not have been necessary to have sold it all to make the sum of $250.67, the amount named in the writ.

It may be urged, however, that the sale was made under the prorating statute of Colorado, and the sheriff had the right, thereunder, to sell enough property to make the aggregate amount called for by all of the writs in his hands. This statute is found at Sections 92a and 92c of Mills' Annotated Code, and reads as follows:

Sec. 92a. "That no final judgment shall be rendered in a cause wherein an attachment writ has been issued and a levy made thereunder, until the expiration of thirty days after such levy has been made, and any creditor of the defendant making and filing an affidavit and undertaking, as hereinbefore required of the plaintiff, together with his complaint setting forth his claim or demand constituting his cause of action against the defendant, shall, *upon application to the court wherein such action is brought*, be made a party plaintiff in such action, and *may have like remedies* against the defendant to secure his claim or demand, as the law gives to the original plaintiff."

Sec. 92c. "The final judgment in said action shall be a *several* judgment, wherein each creditor named as plaintiff shall have and recover of the defendant the amount of his claim or demand, as found to be due together with his costs; and the money realized from the attachment and garnishee proceedings shall under the direction of the court, after paying all costs taxed and included in the said *several* judgments, be paid to the several judgment creditors in proportion to the amount of their several claims as adjusted and included in such several judgments; and the surplus of any such moneys, if any, shall be paid to the defendant by the order of the court."

Under this statute, the court should have made John Ashenfelter and P. H. Fennell parties plaintiff in the action brought by the A. W. Begole Mercantile Company. It should have entered a several judgment in favor of all of the attaching creditors and issued a special execution commanding the sheriff to make the aggregate sum of the amounts found due the several judgment creditors. It did

none of these things and does not appear to have proceeded under this statute at all. It did not make Ashenfelter or Fennell parties plaintiff in the Begole case. It did not enter a several judgment, but separate judgments in favor of each attaching creditor. It did not issue one special execution to carry into effect the several judgment, but a separate special execution for each separate judgment. It was not within the province of the sheriff to correct the errors of the court. He must obey the writ that actually issued if his acts are to be held valid.

It may be claimed that the sale was made under the alleged prorating order (Folios 128, 129). This order, as we have said, is undated, unsigned and does not appear to have ever been entered or even filed in the Court. It is a mere loose paper. But, in any event, it was not a writ directed to the sheriff, nor does it appear that the sheriff ever had the order in his hands. If he did receive it he did nothing under it, since he makes no return upon it. The defendant in error, in his suit to quit title, alleges that the sale was made under the special execution issued in the Begole case (Folio 82). The order could not have been made prior to August 16, 1895, because it recites the receipt of a telegram from Daniel Golden bearing that date, and the special execution was issued and placed in the hands of the sheriff on July 23, 1895. The officer would not have had time to publish the notice of sale between August 16 and August 24, 1895, the date of the sale.

(*b*) Plaintiff in error contends that, even conceding that the Begole, Ashenfelter and Fennell judgments were valid, and considering that the precept under which the property was sold, did, by virtue of the prorating statute of Colorado, authorize the sheriff to make the aggregate amount of all of the above judgments, the sale was nevertheless void, and insufficient to divest plaintiff in error of its title, because it was made for the purpose of satisfying the Fulton judgment also, and this latter judgment was unquestionably void.

The Court will note that in the record of the Fulton judg-

ment it appears from the affidavit for attachment that plaintiff in error is a foreign corporation (Folio 146); that there is nowhere in the record an allegation that could possibly be construed as alleging that plaintiff in error was doing business in the State; that it does not appear that any property was attached; that there was no proper service of the writ of attachment, since it is not returned by the officer to whom it was issued by the Court; that the plaintiff, Fulton, made no application, as required by the prorating statute, to be made a party plaintiff in the action brought by The A. W. Begole Mercantile Co., the first attaching creditor, nor is there any order or other action of the Court making him a party to that or any other suit, and that the execution is a general one and not direceted to the property attached in the other suits. The Fulton judgments stood on the records of the Court as a void personal judgment unconnected, in any way, with the Begole, Ashenfelter or Fennell judgments, and was held to be void by the Court below (Folio 133). It was not even an attachment suit, although a writ of attachment was sued out, because no property was levied on.

In the case of Railroad Co. *vs.* Estill, 147 U. S. 591, this Court in discussing the validity of service upon a foreign corporation in Missouri, in actions in personam, says, on page 607:

"Writs of attachment were sued out in the suits but no property was levied on, and hence the suits stand as though they had been instituted by summons alone."

If Fulton was not an attaching creditor, or if he was not made a party plaintiff in the original attachment suit, the prorating statute above quoted did not give the County Court of Ouray County jurisdiction to sell the property for his benefit, even if his judgment had been valid, and certainly not if his judgment was void. But we are assuming, in this portion of the argument, that the Begole, Ashenfelter and Fennell judgments were valid, and this raises the question whether a sale, valid in part, and void in part, is not

wholly void. If such a sale is to be deemed valid then it is possible for the holders of any number of void judgments, no matter how large in amount, to unite with the holder of a valid judgment, no matter how small, and by making a single sale, enforce, and, in effect, make valid all of their void judgments. If the sale is valid the judgment-debtor must pay the aggregate amount of all the judgments in order to redeem. It does not seem possible for the Courts to hold that such a sale is valid in part and void in part. If so, to what part of the property does the purchaser obtain the title, and to what part does the judgment-debtor retain title ? Courts of justice will not indulge in speculation of this kind. Such a sale must be wholly void. It is an elementary principle of law that a judicial sale, made in pursuance of a void judgment, is also void and confers no title on the purchaser, and that the purchaser must satisfy himself that the Court had jurisdiction. We can see no valid reason why, if the property is sold to satisfy a number of judgments, the purchaser should not be required to see that the Court had jurisdiction to render them all.

The Supreme Court of Colorado, in the case Bassick Mining Co. *vs.* Schoolfield, 10 Colo. 46, has held void an order of sale, made in the mechanic's lien case, in which there were various intervenors, some of whom claimed a lien upon the whole of the property and one of whom claimed a lien only on a part of the property, when the order directed all of the property to be sold and that all of the intervenors should prorate the proceeds of all the property. In other words it was held that the court had no jurisdiction to make an order of sale which directed that the proceeds of the whole property should be shared by a party who had a lien against only a part thereof. On page 51 the court says:

"We think it equally plain that the defect of jurisdiction which we have pointed out was not cured by the fact that the jurisdiction of the Court had attached to all the property under and by virtue of the petitions of the other lien

claimants. Their petitions did not invoke the jurisdiction of the court in respect to the Armstrong claim. We do not see that the court had any greater or different jurisdiction than if the subject matter of each petition had been tried and adjudicated separately. The same fundamental principles fix the limits of the power and authority of the court in the one case as in the other. Curtis *vs.* Leavitt, 15 N. Y. 116."

We have cited the above case not because we consider it as, in all respects, similar to the case at bar, but because we construe the decision to be an adjudication that if the order of sale is made, in part, without jurisdiction then such order is wholly void.

This case of Bassick Mining Company *vs.* Schoolfield was considered by the Circuit Court of Appeals for the Eighth Circuit, in the case of Ryan *vs.* Staples, 76 Fed. 721, S. C. 23, C. C. A. 541. This case in the Federal Court was a controversy between Staples, who held title to the property under the mechanics' lien foreclosure, and the sale mentioned in the case of Bassick Mining Co. *vs.* Schoolfield, and Ryan, who claimed title to the same property under subsequent attachment proceedings. The decision of the Federal Court turned mainly upon the question whether the judgment in the mechanics' lien case was void or merely erroneous. The Circuit Court of Appeals refused to follow the Supreme Court of Colorado, and held that the mechanics' lien suit was a single proceeding, and that the Court having jurisdiction of the parties and subject matter had jurisdiction to make the order of sale; that it was unnecessary for the Colorado Court to decide whether the Schoolfield judgment was void or simply erroneous, and that the Federal Court was not bound by the decision, since it was an adjudication of a principle of general jurisprudence, and that the defendant's title to the property had accrued before the decision by the Supreme Court of Colorado.

We desire to call the Court's attention to the features in which we believe the case at bar may be distinguished from

the case of Bassick Mining Co. *vs.* Schoolfield. In the first place, in the latter case all of the parties intervened and were all in court, and the defendant had an opportunity to protect its rights by a proper objection or by appeal or writ of error. The Court, in that case, had a right to enter some kind of a judgment that would bind every party to the suit. It had a right to decree that Armstrong (the party who had a lien against a part only of the property) should participate pro rata in the proceeds of that part of the property against which he established his lien. In the case at bar the Court had no jurisdiction to render any judgment at all in the Fulton case. It had never levied upon any property and had never obtained any jurisdiction in personam. The judgment was an absolute nullity. In the case of Bassick Mining Co. *vs.* Schoolfield, the Court may be said to have made an error in the distribution of the proceeds of sale by giving to a party more than he was entitled to, that party being entitled, however, to something.

We do not understand that the decision of the Circuit Court of Appeals in the case of Ryan *vs.* Staples in any way opposes our contention that an order of sale made, in part, for the purpose of satisfying a judgment void for lack of jurisdiction, is also void for lack of jurisdiction.

Nor does this decision of the Circuit Court of Appeals in any way deny the correctness of the law as stated in the above quotation from the decision of the Supreme Court of Colorado in the case of Bassick Mining Co. *vs.* Schoolfield. The Circuit Court of Appeals held that judgment to be, at most, simply erroneous; the Supreme Court of Colorado held it to be void for lack of jurisdiction of the subject-matter, but both decisions held that if the judgment was void the sale would be void. The case at bar also differs from the case of Ryan *vs.* Staples, supra, in the fact that the sale in our case was made after the decision of the Schoolfield case (decided in 1887) which may be said to have established a rule of property in Colorado.

It is submitted that if any one of the foregoing conten-

tions of plaintiff in error is sustained, then the proceedings in the County Court of Ouray County were void for lack of jurisdiction, and were not due process of law and, therefore, were insufficient to divest plaintiff in error of its title to the property in controversy; and that the motion of plaintiff in error for a directed verdict, in its favor, should, so far as these proceedings are concerned, have been granted.

V.

It is evident that the defendant in error himself was not entirely satisfied with a title derived through the County Court proceedings, for on March first, 1897, he brought the action to quiet title in the District Court of Ouray County.

In discussing this action to quiet title plaintiff in error makes the following contentions, viz:

(*a*) That both on account of the character of the service and of the nature of the action the proceeding was in personam.

(*b*) That if the action was in personam, then the decree was void, for lack of jurisdiction over plaintiff in error, because the record fails to show that plaintiff in error was doing business in Colorado at the time of service, although it does show service upon a designated process agent within the county of the action.

(*c*) That conceding that the record was sufficient to show that plaintiff in error was doing business in the State, at the time of service, the court below erred in not permitting plaintiff in error to prove, as a matter of fact, that it was not doing business, unless it should also prove that it had not designated a process agent.

(*d*) That if the action was in personam, then the court did not have jurisdiction to enter the decree establishing a title to the property in the defendant in error.

(*e*) That if the action had been in rem under the statute of Colorado, the court would, under that statute, have had no jurisdiction to enter the decree establishing the title to the property in the defendant in error, and

(*f*) That the whole proceeding was void for lack of jurisdiction over plaintiff in error, because, at the time the suit was brought, J. M. Jardine was not an agent of plaintiff in error, and defendant in error knew, or must be presumed to have known, that fact.

(*a*) The proceedings and decree were in personam because they were had in pursuance of, and were founded upon, a personal service within the State. The return of the officer upon the summons shows that service was made upon J. M. Jardine, the designated process agent of plaintiff in error, in Ouray County (Folio 87), and we submit that this fact alone should be sufficient to establish the personal character of the action.

However, an action to quiet title is, in the absence of statute otherwise providing, from its very nature, an action in personam. It is an equitable proceeding and equity acts in personam.

In the case of Hart *vs.* Sansom, 110 U. S. 151, Hart brought an action of ejectment against Sansom and the heirs of Thomas League, in the United States Circuit Court for the Northern Division of Texas, to recover a tract of land in that State. The defendants offered in evidence a judgment rendered, by default, by the District Court of Johnson County, Texas, against Hart and others, upon service by publication on Hart, in their favor. The record of the judgment showed that suit had been brought to remove cloud from title and for possession of the property, and the judgment was that Hart had no title, that certain deeds to other defendants be cancelled and that the plaintiffs in that action be given possession of the property. This judgment was received in evidence in the Circuit Court, and the jury was instructed that it divested plaintiff of his land. A writ of error was taken to this Court, which held the judgment of the District Court to be a nullity, saying, on page 154:

"Generally, if not universally, equity jurisdiction is

exercised in personam and not in rem, and depends upon the control of the court over the persons, by reason of their presence, or residence, and not upon the place where the land lies in regard to which relief is sought.

Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree unless otherwise expressly provided by statute, is clearly not a judgment in rem, establishing a title in land, but operates in personam only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff." (Citing authorities.)

The statute of Colorado which provides for the bringing of suits to quiet title is Section 255, Mills' Annotated Code, which reads as follows:

"An action may be brought by any person in possession by himself or his tenant, of real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate or interest."

In Wall *vs.* Magnes, 17 Colo. 476, the question presented was whether, under the statute just quoted, it was necessary for the plaintiff to prove his title, in case the defendant made no claim of title himself. The Supreme Court held that the plaintiff was not bound to do this, upon the ground that the statute simply recognized the old chancery practice, saying on page 477:

"These provisions simply recognize in statutory form the familiar chancery proceedings whereby a party in possession of real property might compel persons claiming adverse estates or interests to come into court, specify the nature of their claims, and have them fully and finally adjusted."

Hence the statute of Colorado has been held by the Supreme Court of the State to be simply a recognition of the old chancery proceeding which was in personam and which was referred to in Hart *vs.* Sansom, supra.

(*b*) If the action was in personam then the record must show that plaintiff in error was doing business in Colorado at the time of service.

St. Clair *vs.* Cox, supra.

The following cases also hold or recognize the doctrine that a corporation must *be doing business in the State at the time of service of such process.*

Fitzgerald *vs.* Fitzgerald, 137 U. S. 99, 106.
Goldy *vs.* Morning News, 156 U. S. 518, 521, 522, 523.
C. M. L. Ins. Co. *vs.* Spratley, 172 U. S. 602.
Good Hope Co. *vs.* Ry. Barb F. Co., 22 Fed. 637, 638.
St. Louis W. M. Co. *vs.* Cod. Barb W. Co., Fed. 802, 804.
Clews *vs.* Woodstock I. Co., 44 Fed. 31, 32.
Mecke *vs.* V. T. M. Co., 89 Fed. 114, 115.
Doe *vs.* S. B. M. Co., 104 Fed. 685, 687.
Conley *vs.* Mathieson Alkali Works, 190 U. S. 406, 411.
Geer *vs.* Mathieson Alkali Wks., 190 U. S. 428, 430, 431.
Millan *vs.* M. R. F. L. Assn., 103 Fed. 764, 769, 771.

Now what does the record in this case of Walsh *vs.* Cosmopolitan Mining Company *et al.* in the District Court of Ouray County disclose in regard to the doing of business by the plaintiff in error in the State of Colorado? The only allegation in the complaint in regard to this matter reads as follows:

"First. That the defendant is a corporation organized under the laws of the State of Maine, for the purpose, among others, of carrying on a mining business in the County of Ouray and State of Colorado, and by certificate dated December 16, 1885, recorded in Book C-1, page 291, on January 21, 1886, the said J. M. Jardine afterwards was, as required by the laws of the State of Colorado, duly appointed as the authorized agent of the defendant company, upon whom process might be served." (Folios 81-82, p. 44.)

The only other statement in the record bearing on the question is found in the return of the summons by the

sheriff in which it is stated that service was made on Jardine, "the duly authorized agent of the defendant company and designated by it as the person upon whom service should be made." (Folio 87, p. 48)

These statements show that the plaintiff in error, some eleven years before the bringing of this suit, appointed a process agent in compliance with the laws of Colorado and that when it was organized it had the *purpose*, or intention, of doing business in that State. There is not a word in the entire record to show that it actually was doing business in Colorado, at the time of the service, or that it ever had done any business there. The "doing of business means" the *presence* of the corporation. The corporation might have the intention of going to Colorado, and might have appointed an agent, as required by the laws of that State, in order to enable it to do so, and yet not carry that intention into effect. If an individual entertained the purpose of going to Colorado, and engaged lodgings there, the courts of the State certainly would acquire no jurisdiction over him, personally, until he had crossed its borders. The same thing holds true in regard to foreign corporations.

We desire also, in this connection, to call the Court's attention to the fact that the certificate of incorporation of plantiff in error, which purports to enumerate the "*purposes* for which it was organized," is in evidence (Folios 54 to 56), and that not one word is said therein in reference to doing business in Ouray County or in Colorado. The defendant in error, in his answer filed herein, alleges that plaintiff in error abandoned this property as early as 1889, (Folio 11) and that defendant in error has been in possession thereof since June 16, 1896, so that there is no suggestion, in the case at bar, that plaintiff in error was doing business in the State.

If plaintiff in error correctly understands the rule laid down in St. Clair *vs.* Cox, supra, the fact that the corporation is actually doing business, or in other words, is actu-

ally present in the State, at the time of the service, must appear affirmatively from the record. The allegation that some eleven years before the bringing of the suit the corporation had had the intention, and had qualified itself to do business in the State, would, it seems to plaintiff in error, hardly meet the requirements of the rule.

The court below seems to have admitted this record in evidence upon the theory that it was shown that J. M. Jardine had been *designated* as the agent of the company, upon whom process might be served, and that this designation amounted to a voluntary appearance, by the corporation, in case such agent was served, whether the corporation was doing business in the State or not. See opinion of court (Folios 102, 103, 104, pp. 56-57), also (Folio 166, p. 98.)

That such is not the law, we submit, the authorities which we present will fully show.

The case of Forrest *vs.* Pittsburg Bridge Co., 116 Fed., 357, 358, 359, supra, had been decided, by the Circuit Court of Appeals for the Seventh Circuit, before the trial of the case at bar in the court below. The decision, however, had not been published, and the case was not brought to the attention of the court. In that case the question of the validity of service upon a designated agent of a foreign corporation, whose authority was unrevoked of record, after the corporation had ceased doing business in the State, was squarely presented by a motion to quash such service. On pages 358-359, the court, speaking through Mr. Justice Grosscup, says:

"Subject to some criticism as to form and definiteness, the affidavits submitted show that, at the time of the alleged service of summons, Church did not, in fact, represent the Pittsburg Bridge Company. This would dispose of the case, but for this argument: that a foreign corporation, having filed its certificate, in pursuance of the Illinois act naming a representative, continues to be suable in the State, by service on such named representative—irrespective of the corporations actual withdrawal from the State, or the

actual cessation of the agency—until another certificate has been filed setting forth that the person named in the previous certificate is no longer the corporation's representative.

"It would perhaps be competent by apt legislation, to make this the law; but, in the absence of legislation to that end, we do not feel authorized to hold that a foreign corporation may be held to have been found in the State, when it, in fact, at the time, was not doing business in the State; or be held to be represented by an agent, who,in fact, held at the time, no such agency. We find nothing in the act of 1897 disclosing any such legislative intent; nor in the act of 1899, though under certain penalties it provides for notice to the secretary of the state of any change in the name and address of the corporation's agent or representative.

"The manifest purpose of the amendment in the act of 1899, was to require foreign corporations, doing business in the State, to give notice of any change in the name or address of its agent; but this does not imply that such corporation may not withdraw from business in the State without having given such notice. Under what conditions a foreign corporation may withdraw has not been made the subject-matter, so far as we are advised, of any legislation whatever."

We submit that it is utterly impossible to reconcile the decision in this case, with the ruling of the court below in admitting in evidence the record of this suit to remove cloud from title.

The statutes of Colorado do not provide for any notice of revocation of a designated agency. Neither do they prescribe any method, formality or notice of any kind when a foreign corporation withdraws from the State, nor do they, expressly or by implication, continue the authority of the designated agent beyond that time. On the contrary, the only statute having any bearing upon service upon agents of a foreign corporation is Section 38, Subdivision 9th of the Code, supra, and this statute expressly limits such service to agents of corporations "doing business in the State."

Under this statute the authority of a designated agent to bind the corporation, by the receipt of service of process, is not greater, or other, than that of any general agent, and is as independent upon the fact of "doing business in the State," in the one case as in the other.

The designating of a process agent is not a voluntary act on the part of a foreign corporation. It is done to comply with the laws of the State, and thus secure the right to do business there, and the corporation must be presumed to make the appointment, with the statutes prescribing the conditions upon which it can do business, in view. When the corporation withdraws from business in the State, the authority of its designated agent as well as its other agents, at least in the absence of statutes otherwise providing, ceases.

The rule announced in Forrest *vs.* Bridge Co., supra, viz: That the authority of a *designated* agent is dependent upon the doing of business in the State, unless such authority is continued by express statute, is sustained by both Federal and State authorities.

In the case of The People *vs.* Commercial Alliance Life Insurance Company, 40 N. Y. S. 269, 271, the validity of a judgment, in Maine, against a foreign corporation, by service upon the State Insurance Commissioner, designated as a process agent by statute, after the company had ceased to do business in Maine, was before the court in New York. In this case the company ceased to do business on the 30th day of June and the service was made on the 3d day of July of the same year. The Court held the service bad, saying, on page 271:

"The judgment must stand, if at all, on the service made on the State Insurance Commissioner, which was on the 3d day of July; and the referee found in substance that the service was ineffectual to bind the company in New York, because on that day the company was not doing business in the State of Maine, and that the Maine court had no jurisdiction of the company to render a judgment enforceable outside the State of Maine. When a foreign

corporation undertakes to transact business in a State other than that in which it is incorporated, it undoubtedly submits itself to the authority of the courts of that other State, and will be bound by the statutory provisions respecting such courts obtaining jurisdiction over it. Gibbs *vs.* Insurance Co., 65 N. Y. 114. While this Commercial Alliance Company was transacting business in the State of Maine, it was subject to the provisions of the State of Maine respecting service of process in an action against it on the State Commissioner of Insurance, in the absence of any authorized agent of the company upon whom service might be made. But that subjection does not last forever. As the Commercial Alliance Insurance Co. had ceased to do business on the first day of July, 1894, had withdrawn from the State, and had no authorized agent upon whom service might be made after that date, the substituted service on the State Commissioner would not bind it as the equivalent of personal service. The effect of the statute of Maine was to constitute the Insurance Superintendent the agent of the company to receive process under certain circumstances, viz., while such company was doing business in the State * * * But after the 30th day of June, 1894, it was not a foreign corporation doing business within the State of Maine and the Maine courts had no jurisdiction over it to render a judgment in personam against it on substituted service."

In the case of the Mutual Reserve Fund Life Association *vs.* Boyer, 61 Pac. 387, 388, 390, 391, (Kas.) the company had ceased to do business in the State of Kansas about two years before suit was brought and service was made upon the Insurance Commissioner. The Kansas statute expressly made an appointment of the Insurance Commissioner "irrevocable." The court held the service invalid, on page 390, saying:

"The instrument filed with the superintendent of insurance was in the nature of a power of attorney. What meaning must be given to the term 'irrevocable' used in this power of attorney? Does it mean that the statute implies 'never to be revoked'; never to be abrogated, annulled or withdrawn? We cannot think it comprises such significance."

And again on page 391:

"With the withdrawal of the insurance company from this State the subject-matter with respect to which the power was conferred, to wit, the business here transacted by the company thereunder, and with the probably exception above-mentioned (cause of action arising in the State expressly provided for by the Kansas statute) the company ceased to be amenable to our jurisdiction."

In the case of Eureka Company *vs.* California Insurance Co. 130 Calif. 153, it appeared that service was made upon a person who had formerly been an agent of the defendant foreign corporation, but that at the time of service the foreign corporation had ceased to do business in the State. Upon a suit upon a judgment obtained on this service, the court held the judgment void, saying on pages 154, 155:

"Plaintiff brought this action on a judgment rendered in its favor against the defendant in the Circuit Court of the State of Alabama. Judgment was rendered in favor of the defendant and the plaintiff has appealed.

The defendant is a corporation organized under the laws of this State, with its office and principal place of business at San Francisco. In the action brought against the defendant in the State of Alabama service of process was made upon a person who had at one time been the agent of the defendant in that State but who had ceased to be such agent prior to the time of said service and at that time the defendant had ceased doing business in the State of Alabama and had no agency or agent within the State. Upon this service the defendant made default and judgment was rendered against it for the amount claimed by the plaintiff.

"Under these facts it must be held that the Circuit Court of Alabama did not obtain jurisdiction of the person of the defendant and that the judgment entered against the defendant did not create a right of action against the defendant in the courts of this State (St. Clair *vs.* Cox, 106 U. S. 350; Henning *vs.* Planters Ins. Co., 28 Fed. 440). The jurisdiction of the Alabama court was the essential part of the plaintiff's cause of action herein, and it was incumbent upon the plaintiff to make proof of such jurisdiction in order to entitle it to judgment. The recital in the

judgment that 'proof was made in open court that George Eustice, on whom service was made in this cause, was agent of the defendant at the time of service of the summons and complaint on him' is not conclusive of the jurisdiction of the court over the defendant, it does not preclude the defendant from showing that Eustice was not such agent (*In re* Estate of James, 99 California, 374; Greenzweig *vs.* Strelinger, 103 Calif. 278)."

In the case of De Castro *vs.* Telegraph Co., 76 Fed. 425, 426, there was a service on the agent of the company after it had ceased to do business in the State of New York, and on page 426, Lacombe, J., says:

"When it is questioned whether or not a corporation is to be 'found' within a Federal district, so that general service of a summons can be effected upon it and not merely such qualified service as will affect only such property as it may have within the district, the test to be applied is whether or not it is doing business within the district. When it organizes to do business here, it comes here; while it continues to do business it remains; and when it finally ceases to do business, it departs. It has been held by the Supreme Court that service upon an officer of a non-resident corporation who is temporarily within the State is not sufficient to give jurisdiction of a foreign corporation not doing business within the State, although the State statute as interpreted by the highest court of the State expressly authorizes such mode of service. Goldey *vs.* Morning News, 156 U. S., 518, 15 Sup. Ct. 559. It is not so easy to see that, the mere refusal of the State authorities to revoke the designation for purposes of service, made while the corporation was in business here, will operate to prolong indefinitely the original designation long after the corporation may have departed."

In the case of Guthrie *vs.* Indemnity Association, 101 Tenn. 643, the court, after reciting that the plaintiff had attempted to get service upon the defendant through the Insurance Commissioner, and that such service had been held void because the defendant was not doing business in the State, holds, that service upon Witherspoon, the local agent of the defendant, when the transaction was made, is, for the same reason, void under the statutes.

On page 650 the court quotes the statute of Tennessee as follows:

"The act of 1887 provides that any non-resident corporation doing business in this State shall be subject to suit here, so far as relates to any transaction had in whole or in part in this State, or in causes of action arising here, but not otherwise."

One James Witherspoon had been the agent of the company when the policy was issued, but prior to the suit the company had ceased doing business in the State. On page 652 the court says:

"It does not appear that this company was found transacting business during the year 1895, and hence we think that the Circuit Court Judge was in error in holding that the service of process might have been on James Witherspoon under the act of 1887."

The case of Graves *vs.* Posner (Covenant Mut. L. Ins. Co., garnishee), 82 N W., 1022 (Iowa), holds that service upon the State Auditor as the designated agent of a foreign insurance company, can only be made while the company is doing business in the State, saying on page 1023:

"The society began business in the State in 1836, and, as its designated attorney had been dead several years, all service of process or notice, prior to October 1, 1897, was properly had on the State Auditor. But under the code such associations, as a condition precedent to doing business in the State, were required to 'file in the office of the Auditor of State an agreement in writing that thereafter service of notice or process of any kind may be made on the Auditor of State, and when so made shall be as valid, binding and effective for all purposes as if served upon the company according to the laws of this or any other State, and waiving all claim or right of error by reason of such acknowledgment of service.' Sec. 1722. It will be observed that by this written agreement power is conferred on the auditor to acknowledge service, and not independent of it. Without such consent he might not act in behalf of the association. No one questions the right of the State to prescribe the method by which cor-

porations doing business within its limits may be brought into court, and if they persist in transacting business in the State doubtless they will not be heard to plead non-compliance with this statute. Sparks *vs.* Association, 100 Iowa, 459, 69 N. W., 678. But no agreement was on file before December 2, 1897, and the evidence fails to show the transaction of any business by the garnishee between October 1st and that date. The association had a reasonable time within which to settle upon the course it would pursue, and the law indulges in the presumption, in the absence of proof to the contrary, that in the meantime it yielded obedience to this statute. Its annual report indicates a large amount of business during the year, but not in this interim, *and it does not appear from the record* that any insurance certificates were issued.

"No jurisdiction over the Covenant Mutual Life Association was acquired, and defendant's motion to discharge it as garnishee was rightly sustained."

As was suggested in the case of Forrest *vs.* Bridge Co., supra, there is no doubt that it would be competent for a State to provide that a foreign corporation should be liable in its courts, upon all transactions that occurred while it is doing business there, although it had ceased doing business at the time of service, but if such is to be the effect the statute must so provide.

Green *vs.* Life Association, 105 Iowa, 628, 637–8.

In the case of Hazeltine *vs* Insurance Co., 55 Fed., 743, 750, the Court after holding that the insurance company had never done business in the State of Maine was therefore not liable to suit there under the statute of Maine, says, on page 750:

"The truth about the matter is that while the obvious spirit of the thing contemplated by your statutes is that, in the exercise of their dominion over persons and things situate within their territory, and their conceded power to regulate the terms upon which foreign corporations shall be admitted to traffic with those persons and about those things, they desire to provide, with commendable justice, that whenever a cause of action arises or relates to persons and things within their respective dominion by the destruc-

tion of the property insured, or other injury or breach of contract, these corporations shall submit to judgment there, and the citizens of that State shall not be forced to go to a distant jurisdiction, to the corporate domicile, to bring their suit or to get their money. But they do not use apt words to compel these, and the courts on the language we have here, must rule, upon the case we cite, that that object has not been accomplished. The remedy is to amend the legislation and to define the conditions upon which the corporation may act more explicitly."

Indeed this Court has held, practically, in the case of Mutual R. F. L. Association *vs.* Phelps, 190 U. S. 147, 156, S. C. 23 Sup. Ct. R. 707, that the statute of Kentucky, as interpreted by the court of appeals of that State, in the case of Germania Ins. Co. *vs.* Ashby, 23 Ky. L. Rep. 1516, S. C. 65 S. W. 611, continues the authority of the Commissioner of Insurance as a designated agent to receive service of process, although the company may have ceased to do any new business in the State, at least so far as transactions made in the State when it was doing business there are concerned.

It is to be observed, that, in this Kentucky case, the corporation was, at the time of service, engaged in transacting a substantial part of its business in the State, viz., that of collecting premiums and adjusting losses on old business, but, we believe, that even if this had not been so, this court would have followed the Kentucky Court of Appeals, not only for the reason that it was an interpretation of a State statue by its court of last resort, but because that interpretation was reasonable and just. The Kentucky statute as quoted in the case of Germania Ins. Co. *vs.* Ashby, supra, reads as follows:

"Before authority is granted to any foreign insurance company to do business in this State it must file with the Commissioner a resolution adopted by its Board of Directors consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of the State in any action brought or pending in this State shall be a valid service upon said Company."

This case of Germania Insurance Co., *vs.* Ashby, supra, was decided upon the authority of the case of Home Ben. Soc. *vs.* Muehl, 59 S. W., Rep. 520, decided by the Kentucky Court of Appeals, December 7, 1900. In this last mentioned case the court quotes on page 520, the Kentucky statute of 1870 which was repealed by the statute last quoted above which was passed in 1893. The Act of 1870 contained an *express* provision continuing the authority of the agents of foreign insurance companies to receive service of process, after the withdrawal of the corporation from the State, so far as any transactions made in the State were concerned. The court read the two statutes together and held that the purpose of the Act of 1893 was, not to repeal that part of the Act of 1870 which continued the agent's authority, but on the contrary that its purpose was to provide an agent who could be served when the other agents were no longer in the State.

The fact that the Kentucky statute of 1893 does not limit the time of the continuance of the commissioner's authority and provides for the appointment of a corporation *sole* which never dies, as agent, together with the fact that the corporation is required to agree in advance that such service shall be valid indicates very strongly that it was the intention of the Legislature of Kentucky to continue the authority of the Commissioner after the corporation withdrew from the State, at least so far as transactions made in the State were concerned, especially, when it is remembered that the Kentucky statute of 1870 had expressly so continued the authority of other agents of the corporation.

The statutes of Colorado on this subject will bear no such construction, however. Section 499 of Mills' Ann. Stats, supra, provides for the *appointment* of process agents by foreign corporations and for the convenience of the Court is quoted again, viz:

Sec. 499. "Foreign corporations shall, before they are authorized or permitted to do business in this State, make

and file a certificate signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of the Recorder of Deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served."

Paragraph Ninth of Section 38, of the Colorado Code, supra, which is the only statute providing for the *service* of process on these designated, and other agents is quoted again and reads as follows:—

"Sec. 38. A summons shall be served as follows:

"Ninth. If the action be against a foreign corporation, or joint stock company or association, organized under the laws of another State or Territory, *and doing business within this State* the summons *shall* be served by delivering a copy to any agent of such corporation, company or association *found in the county* in which the action is brought. If no such agent be found in such county, then by delivering a copy of the summons to any stockholder who may be found in such county."

It will be seen that the Colorado statutes provide for the appointment of a natural person and not a corporation sole as in Kentucky; that they restrict such appointment to individuals residing at the designated principal place of business; that they confine the authority of such agents to suits brought in the county where they are served; and that they expressly limit the service of process upon any agent of a foreign corporation to those corporations which are doing business in the State (Rust *vs.* Water Works Co., supra). Not only is there no indication of an intention on the part of the Colorado legislature to continue the authority of designated agents beyond the cessation of business by the corporation in the State, but the contrary intention is clear, manifest and express.

(*c*) If, however, we concede that the allegations contained in this record were sufficient to show that plaintiff in error was doing business in the State, then we contend

that plaintiff in error should have been permitted to prove that it was not doing business there without being compelled to prove also that it had not designated a process agent.

We think that we have shown that the "doing of business" or the actual presence of the foreign corporation within the territorial jurisdiction of the court, is a juris dictional averment in an action in personam, and, if contained in the record, it may be controverted by extrinsic evidence.

We submit that it has also been shown that, in Colorado, a designated process agent's authority ceases when the corporation withdraws from the State, and if this statement of the law is correct, then the evidence offered by plaintiff in error to prove that it was not doing business in Colorado, at the time of service of process in this suit to quiet title, should have been admitted without condition.

(*d*) Our next contention, in reference to this suit to quiet title, is that the action being in personam, the court had no jurisdiction to enter a decree therein establishing the title to the property in the defendant in error.

Our authority for this statement is Hart *vs.* Sansom, 110 U. S. 151, supra, where this court in discussing a suit to quiet title, as an action in personam, and the power of the court in such a case, says on page 155 :

"It has no inherent power by the mere force of its decree, to annul a deed, or to establish a title."

The decree, of which this Court was speaking, in that case, after annulling certain deeds, declared that Hart had no title to the property and gave possession to the plaintiffs. The decree in question here, so far as pertinent, reads as follows :

"It is therefore considered, adjudged and decreed by the Court, that the said defendants have not, nor have either of them any right, title, interest, claim or demand in or to any part of the premises above described, and that the pretended claim of the defendant, The Cosmopolitan

Mining Company, in and to said premises is wholly without right or justification in law. *That the plaintiff is the owner* and in possession of the premises and mining claims above described and entitled to the quiet and peaceable possession of said mining claims and each of them." (Folio 92.)

The District Court of Ouray County decreed, not only that plaintiff in error had no title, but that defendant in error did have title, and was the owner of the property. Such a decree, if given effect, must certainly establish a title.

Defendant in error, in his complaint in that action, alleges, as his sole source of title, the judgments rendered in the County Court cases, the execution and sale made in the case brought by the A. W. Begole Mercantile Company, the sheriff's deed made in pursuance thereof, and a conveyance to himself by the sheriff's grantee (Folios 82-83). If this sheriff's sale was void, he had no title before the decree was signed, but the property belonged to plaintiff in error. If defendent in error has title now it must be by virtue of the decree. How then can he be heard to say that the decree did not establish a title in him, but simply quieted his title, when he had no title to be quieted? If the decree is to be given effect, it must be given the effect of having transferred the title from plaintiff in error to defendant in error and of having established the title in the latter.

(*e*) Thus far we have discussed this proceeding as an action in personam. We wish, now, to take up the question of the jurisdiction of the court to enter a decree establishing a title, if it had been rendered in pursuance of constructive service, and, therefore, might be considered in rem.

A State must, from the obvious necessities of the case, have the right to provide, by statute, that constructive service may be had, upon absent defendants, in actions to quiet title to lands within the State. The State of Colorado has, inferentially at least, exercised this right in enacting Section 25-35 Mills' Ann. Stats., which reads as follows:

"In all actions pending in any court of record of this State, or which may hereafter be brought in any such court wherein any defendant is not found within the jurisdiction of the court, and constructive service alone is had, and which is brought * * * for the removal of cloud from title to real estate * * * or in any other proceeding in rem, or effecting only specific property, where according to the usual practice in courts of chancery, the court, if the defendant had been personally served, might direct or decree any act to be done or performed by the defendant in favor of the plaintiff, the court may appoint a trustee for such defendant to do and perform in the place and stead of and for each defendant the act required by the decree rendered in any such cause. Any act lawfully done by such trustee, under and in pursuance of any such decree shall be as binding and effectual for all purposes as if done and performed by the defendant in pursuance of such decree."

The case of Hart *vs.* Sansom, supra, recognizes the right of a State to enact just such a statute as this, but holds that, in that case, the court acts in personam and has no power to establish a title, saying on page 155:

"It would, doubtless, be within the power of the State in which the land lies to provide by statute that, if the defendant is not found within the jurisdiction or refuses to make or cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose. Felch *vs.* Hooper, 119 Mass. 52; Ayer *vs.* Murray, 105 U. S. 128–132."

"But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts in personam, by compelling a deed to be executed or cancelled by or in behalf of the party."

"*It has no inherent power by the mere force of its decree, to annul a deed or to establish a title.*"

The case of Arndt *vs.* Griggs, 134 U. S., 316–318, 329, held that a State had power, by express statute, to provide, not only for constructive service upon absent defendants, but also to provide that the title to the lands might be established in such a proceeding.

The Nebraska Statute under which Arndt *vs.* Griggs is

decided, reads, Section 57 (Compiled Laws of Nebraska, 1885):

"An action may be brought and prosecuted to final decree, judgment or order, by any person or persons, whether in actual possession or not, and claiming title to real estate, against any person or persons, who claim an adverse estate or interest therein, for the *purpose of determining such estate or interest*, and quieting the title to such real estate."

Section 58:

"All such pleadings and proofs and subsequent proceedings shall be had in such action now pending or hereafter brought, as may be necessary to fully determine the question of title as between the parties to said real estate, *and to decree the title to the same or any part thereof*, to the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment or order into effect."

But if the law announced in Hart *vs.* Sansom is to be changed or modified, express legislation is necessary to effect that result, and we submit that the statute of Colorado which we have quoted and which is the only statute relating to the subject, did not give the District Court of Ouray County jurisdiction to enter the decree establishing the title to the property in the defendant in error, even assuming that the proceeding had been in rem. The statute must be strictly complied with. (Bleidorn *vs.* Pilot Mt. C. M. Co., 89 Tenn. 167, 177–8.)

(*e*) But if this action to quiet title had been regular and valid in every other respect, we submit that it would be void for lack of jurisdiction over plaintiff in error, if J. M. Jardine was not its agent at the time he was served and, especially, if defendant in error knew, or would be presumed to know, that he was not such agent.

Jardine's affidavit to the effect that he was not such agent and refused to act as such had then been on file in the record of the case brought by the A. W. Begole Mercantile Co. for nearly two years. Defendant in error relied

upon the record in that case, as well as the others, as the source of his title, as appears from his complaint in the action to quiet title. Either he, or his attorney, which amounts to the same thing, must be presumed to have known the contents of a document that was a part of the records constituting his title. That the defendant in error's attorney did have actual knowledge of the affidavit is indicated by the fact that he made Mr. Jardine a party defendant in the action to quiet title, although Jardine had never had anything to do with the title to the property, nor had he been a party to any of the proceedings in the County Court through which the defendant in error claimed title. Jardine was, we submit, made a party defendant in order that he might have an opportunity to file the answer which he did file therein one day after he was served (see return of summons folio 87, and Jardine's answer, folio 84), which answer was intended to explain and contradict the affidavit as far as possible. The answer shows this upon its face and reads as follows:

"Now comes the defendant J. M. Jardine, and for answer to the complaint filed herein says:

First. That the only interest he has had in this matter grows out of the fact that the summons in each of the original actions in the complaint mentioned was served upon him as agent of the defendant company, and that upon said writ being so served upon him, he duly mailed the same to the president of the defendant company with postage fully paid, in envelopes with return card printed thereon. The said letters were not returned to this defendant nor was he instructed in any manner by the defendant company, or its officers to defend said actions, nor did he have any knowledge of facts on which said actions could be defended, and therefore allowed judgments in said action to be taken without interposing any defense on the merits. That since the entry of said judgment and the sale of the premises in the complaint thereunder, he has

not claimed, nor pretended to claim any interest in said premises adverse to the plaintiff.

We submit, therefore that, in the suit to quiet title, the decree rendered therein, was void, for lack of jurisdiction and for want of due process of law, and was insufficient to divest plaintiff in error of its title to the property in controversy, and that, so far as this proceeding, also, is concerned, the motion of plaintiff in error for a directed verdict should have been granted.

Respectfully submitted.

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GEORGE C. PRESTON.

APPENDIX.

THE A. W. BEGOLE MERCANTILE CO.
vs.
COSMOPOLITAN MINING CO.

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court Thereof.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.* } Complaint.

The plaintiff complains and alleges:

I. That the amount involved in this action for which relief is sought does not exceed the sum of two thousand dollars.

II. That the plaintiff is a corporation duly incorporated and organized under and by virtue of the laws of the State of Colorado and at all times hereinafter mentioned has been such corporation doing business in the City of Ouray, County of Ouray and State aforesaid.

III. That the defendant is a corporation duly incorporated and organized under and by virtue of the laws of the State of Maine, *with its principal office in the State of Colorado at Ouray, in said Ouray County.*

And for its first cause of action against the defendant the plaintiff alleges:

I. That on or about the 24th day of July, 1894, the defendant was indebted to plaintiff for and upon an account for goods, wares and merchandise sold and delivered by plaintiff to defendant, at defendant's special instance and request, in the sum of $137.32, said goods, wares and merchandise being furnished between the 8th day of May, 1894, and the date last aforesaid.

II. That the said sum of $137.32 has not been paid nor any part thereof, and the same is now due and owing from defendant to plaintiff, together with interest thereon at the rate of eight per cent per annum from the said 24th day of July, 1894.

And for a second cause of action against the defendant the plaintiff alleges :

I. That on or about the 1st day of January, 1895, the defendant was indebted to the San Juan Hardware Company, a corporation doing business in the said City and County of Ouray, in the sum of $75.70, for and upon an account for goods, wares and merchandise sold and delivered by the said San Juan Hardware Company to the defendant's special instance and request, between the 17th day of May, 1894, and the date last aforesaid.

II. That on or about the 25th day of April, 1895, the said The San Juan Hardware Company, assigned, transferred and set over to this plaintiff said account for collection.

III. That the said sum of $75.70 has not been paid nor any part thereof, and the same is now due and owing from the defendant together with interest thereon at the rate of eight per cent per annum from the 1st day of January, 1895.

Wherefore plaintiff demands judgment against the defendant.

1. For the sum of $137.32, together with interest thereon from the 24th day of July, 1894, as in the first cause of action herein set forth.

2. For the sum of $75.70, together with interest thereon from the 1st day of January, 1895, as in the second cause of action herein set forth.

3. For costs of suit and for such other relief as to this court may seem meet and proper.

(Signed) EMERSON AND BRADSHAW,
Attorneys for the Plaintiff.

(Above document was duly verified and endorsed.)

STATE OF COLORADO, County of Ouray, } ss:

In the County Court Within and for the County of Ouray Aforesaid.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Complaint.

J. C. Marsh, president of the plaintiff corporation of said county, being duly sworn, doth depose and say that The Begole Mercantile Company against whom the said A. W. Begole Mercantile Company is about to sue out an attachment is indebted to him in a sum not exceeding twenty hundred dollars, to wit, the sum of two hundred thirteen and $\frac{2}{100}$ dollars with interest; and that the said demand is now due and owing, and that the sum is due and owing from the defendant to the plaintiff for and upon an overdue book account for goods, wares, and merchandise sold and delivered by the plaintiff to the defendant, at defendant's special instance and request, between the 8th day of May, 1894, and the 24th day of July, 1894, amounting to $137.32; and upon an overdue book account for goods, wares, and merchandise sold and delivered by the San Juan Hardware Company to defendant at defendant's special instance and request, between the 17th day of May, 1894, and the 1st day of January, 1895, amounting to $75.70, and by the said The San Juan Hardware Company assigned to the plaintiff herein for collection.

(Signed) J. C. MARSH.

Sworn and subscribed to before me this 26th day of April, A. D. 1895.

ROBERT H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Dep. Clerk.

[SEAL.]

(Above document was duly endorsed.)

STATE OF COLORADO, } ss:
Ouray County, }

In the County Court in and for the County of Ouray, in the State Aforesaid.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Undertaking on Attachment.

Whereas, the above-named plaintiff has commenced, or is about to commence, an action in the County Court in and for the County of Ouray, in the State aforesaid, against the above-named defendant, upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of two hundred and thirteen and $\frac{100}{100}$ dollars lawful money of the United States, besides interest, and is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein.

Now, therefore, we, the undersigned, residents of the County of Ouray, State of Colorado, in consideration of the premises and of the issuing of said attachment do jointly and severally undertake in the sum of four hundred and seventy-five dollars and promise to the effect, that if the said defendant recover judgment in said action, or if the said court shall finally decide that the said plaintiff was not entitled to an attachment, the said plaintiff will pay all costs that may be awarded to the said defendant and all damages which it may sustain by reason of the wrongful suing out of the said attachment, not exceeding the sum of four hundred and seventy-five dollars.

Dated this 26th day of April, A. D. 1895.

(Signed) A. W. BEGOLE MERC. CO.
(Signed) J. C. MARSH, *President*.
J. C. LANGLEY.

(On the back of the foregoing document was a form of jurat, but same was not filled out. Document was duly endorsed.)

STATE OF COLORADO, County of Ouray, } *ss :*

In the County Court Within and for the County of Ouray, State of Colorado.

THE A. W. BEGOLE COMPANY, a Corporation, *Plaintiff*, *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.* } Writ of Attachment.

The People of the State of Colorado to the Sheriff of the said County of Ouray, Greeting :

Whereas, the above-entitled action was commenced in the County Court in and for the said County of Ouray in the State of Colorado, by the plaintiff in the said action to recover from the defendant, The Cosmopolitan Mining Company in the said action the sum of two hundred and thirteen and $\frac{00}{100}$ dollars, lawful money of the United States, besides interest at the rate of 8 per cent per annum from the day of , A. D. 189 , and costs of suit ; and the necessary affidavit and undertaking herein having been filed as required by law :

Now, we do therefore command you, the said sheriff, that you serve a copy hereof on the above defendant, if he be found in your county, and also attach and safely keep all the property of said defendant, The Cosmopolitan Mining Company, within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand as above mentioned, unless the said defendant deposit with you an amount, or give you security by an undertaking of at least two sufficient sureties, in an amount

sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached ; in which case you will take such undertaking, and hereof make due and legal service and return.

Witness Robert H. Wilson, judge and clerk of said court, and the seal thereof at Ouray, this 26th day of April, A. D. 1895.

[SEAL] ROBERT H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } *ss :*
Ouray County, }

I do certify that I have duly executed the within writ on this 26th day of April, A. D. 1895, by levying upon and attaching all the right, title, interest, claim, and demand and equity of redemption of the Cosmopolitan Mining Company in and to the following real property, to-wit : The Yellow Rose lode ; the Crusader lode ; the Norma lode ; the Talisman lode ; the Hidden Treasure lode ; the Gertrude lode, and the Emily lode mining claim, situate in Imogene basin, Mt. Sneffles mining district, County of Ouray and State of Colorado, and also the mill sites and each and every of them in said basin, district, county and State, to said lodes and each and every of them belonging, which said lodes and mill sites are more accurately described in detail and identified by metes and bounds in the books of record in and for the recorder's office of the said county of Ouray and State of Colorado, and to which reference is hereby made. And I hereby certify that I have further executed the within writ by filing a true copy of this levy in the office of the county clerk and recorder of Ouray County, said State, this the 26th day of April, 1895. Further, that I have been unable to make service of

the within writ on the within-named defendant, there being no person within my said county upon whom process might be served.

MAURICE CORBETT,
Sheriff.

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Summons.

The People of the State of Colorado to the Cosmopolitan Mining Company, a Corporation, the Defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the County Court of Ouray County, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county; or if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint. And if a copy of the complaint in the above-entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover the sum of $137.32, with interest, for goods, wares and merchandise sold and delivered by plaintiff to defendant; and the further sum of $75.70, with interest, for goods, wares and merchandise sold and delivered by the San

Juan Hardware Company to defendant, and by the said hardware company assigned to this plaintiff for collection and for costs of suit, as will more fully appear from the complaint in said action to which reference is here made. *

And you are hereby notified that if you fail to appear, and to answer the said complaint as above required, the said plaintiff will take judgment by default against you in accordance with the prayer of said complaint.

Given under my hand and the seal of said court at Ouray in said county, this 29th day of April, A.D. 1895.

[SEAL.] ROBERT H. WILSON,
Judge and Clerk.
MARY F. WILSON,
Deputy Clerk.

*A copy of which is hereto attached.

STATE OF COLORADO, }
County of San Miguel, } *ss:*

I do hereby certify that I have duly served the within summon, together with a copy of the complaint in the within-stated action, on this 7th day of May, A. D. 1895, by personally delivering a true copy of said summons, together with a copy of the original complaint in the action therein mentioned, thereto attached, to J.M. Jardine, *the duly authorized agent* of the within defendant company.

J. C. RUTAN,
Sheriff.

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } ss.
County of Ouray, }

In the County Court Within and for the County of Ouray, State of Colorado.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, vs. THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Writ of Attachment.

The People of the State of Colorado to the Sheriff of the County of San Miguel, Greeting:

Whereas, the above-entitled action was commenced in the County Court in and for the said County of Ouray, in the State of Colorado, by the plaintiff in the said action to recover from the defendant Cosmopolitan Mining Co. in the said action the sum of two hundred thirteen and $\frac{2}{100}$ dollars, lawful money of the United States, besides interest at the rate of 8 per cent per annum from the day of , A. D. 189 , and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law:

Now, we do therefore command you, the said sheriff, that you serve a copy hereof on the above defendant if he be found in your county, and also attach and safely keep all the property of said defendant Cosmopolitan Mining Co. within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand as above mentioned unless the said defendant deposit with you an amount, or give you security by an undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking and hereof make due and legal service and return.

Witness my hand as the clerk of said court, and the seal thereof at Ouray this 29th day of April, A. D. 1895.

ROBERT H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } *ss:*
San Miguel County, }

I do hereby certify that I have duly executed the within writ on this 7th day of May, A. D. 1895, by delivering a true copy of the within writ to J. M. Jardine, *the duly authorized agent* of the within defendant company.

J. C. RUTAN,
Sheriff.

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court Thereof.

THE A. W. BEGOLE MERCANTILE COMPANY,
Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY,
Defendant.
} Motion.

Come now J. M. Jardine, upon whom papers purporting to be a summons and writ of attachment in the above-entitled cause were served on May 8, 1895, and respectfully represents to the court:

1st. That he is not, and has not been for several years past, a resident of Ouray County in said State, and therefore could not be an agent of defendant company in accordance with the general laws of this State under the facts alleged in the complaint herein.

2d. That he has not for years acted as agent of said company defendant, does not consider himself or hold

himself out to be such agent, and refuses to accept service or do any other act on behalf of said defendant.

Wherefore he moves the court to quash the service of said summons and writ and hold the same for naught.

(Signed) J. M. JARDINE.

STATE OF COLORADO, } ss:
San Miguel County. }

Subscribed and sworn to before me this 18th day of May, 1895.

My commission expires May 16, 1899.

STEPHEN A. BAILEY,
Notary Public.

Endorsed on the back as follows:

STATE OF COLORADO, }
Ouray County. }

In the County Court.

THE A. W. BEGOLE MERCANTILE COMPANY, }
vs.
THE COSMOPOLITAN MINING COMPANY. }

Notice to the court that party purporting to have been served was not an agent of defendant.

Filed May 27, 1895.

ROB'T H. WILSON,
Judge and Clerk.

STATE OF COLORADO, } ss:
Ouray County, }

In the County Court in and for said County.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, *vs.* COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Default and Judgment.

The defendant Cosmopolitan Mining Company, having failed to appear and answer, move or demur to the

complaint in this action, according to law, as required by the summons, the plaintiff hereby applies for default and entry of judgment.

Dated this 14th day of June, A. D. 1895.

To Robert H. Wilson, judge of said court.

(Signed) EMERSON & BRADSHAW,
Plaintiff's Attorney.

(The foregoing default and judgment was duly endorsed.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Default.

On this 27th day of June, 1895, plaintiff by its counsel, Emerson and Bradshaw, appeared and filed their application for default herein against the above-named defendants and it appearing to the court that summons has been served upon one J. M. Jardine, the *heretofore* duly authorized and acting agent for said company, and that the said defendant has made no appearance herein; and it further appearing that the complaint of plaintiff is duly verified, and that the time for the appearance of said defendant has expired. It is therefore ordered that default do and the same hereby does enter against said defendant.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } 1437. Judgment.

Now on this day appeared Emerson and Bradshaw, attorneys, for plaintiff, the said defendant appearing not, and moved the court that the said cause come on for hearing upon its merits, whereupon the evidence on behalf of plaintiff was introduced before the court without the intervention of a jury. And it appearing to the court that the said defendant is justly indebted to

the said plaintiff in the sum of 226.09 dollars, including interest to date. And it further appearing that default has been duly entered herein in favor of the plaintiff and against the said defendant.

It is therefore ordered by the court, after being fully advised in the premises and after having heard the testimony of the said plaintiff introduced herein in open court, that the said plaintiff The A. W. Begole Mercantile Company do have and recover of and from the said defendant The Cosmopolitan Mining Company the just and full sum of two hundred and twenty-six $\frac{9}{100}$ dollars together with its costs herein expended taxed at 24.58 dollars.

And it is further ordered that the attachment herein be sustained. For which judgment let special execution issue.

(Signed) ROBERT H. WILSON,
Judge.

STATE OF COLORADO, } ss :
Ouray County, }

In the County Court.

THE A. W. BEGOLE MERCANTILE COMPANY,
Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY,
Defendant.
} Prorating Order.

Now on this day this cause comes on to be heard on motion of Emerson & Bradshaw, attorneys for the above-named plaintiff, for an order prorating the amount to be realized from the sale of the attached property by the several attaching and judgment creditors, and it appearing to the court that the following judgments have been rendered and entered against the Cosmopolitan Mining Company under and by virtue of the several attachments issued out of this court as follows, to wit :

The A. W. Begole Mercantile Company, $226.09,

John Ashenfelter $49.82, P. H. Fennell $126.12, W. C. Fulton $1,049.90, and D. L. Golden $.

And it further appearing to the court that in said suit property belonging to the defendant company was attached for the purpose of satisfying such judgments as might be obtained by the several plaintiffs against the said defendant company.

It is therefore ordered that the sheriff of Ouray County proceed to sell the above described property or so much thereof as shall be necessary to satisfy said several judgments, together with the costs and interest thereon.

And it is further ordered that in case the sum realized from such sale shall not be sufficient to satisfy said several judgments, interest, and costs in full, that then the amount realized from said sale shall be appropriated as follows, to wit:

First. To the payment of all costs connected with the said several suits and proceedings.

Second. The amount remaining to be prorated and paid to the said several judgment creditors in accordance with the amounts of the said several judgments entered herein, save and except as to the judgment obtained by D. L. Golden; and with respect to said judgment it appearing to the court that a telegram dated Denver, August 16, 1895, was received by the above-named plaintiff and signed by the said Golden stating that his judgment had been settled; it is ordered by the court that the sale of said property and that this prorating order shall not extend to or include said judgment of the said D. L. Golden, but that the same shall stand in abeyance until the further order of this court in the premises.

Witness Robert H. Wilson, Judge and clerk of said court, this day of , 1895.

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court Within and for said County and State.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*,
vs.
COSMOPOLITAN MINING COMPANY, *Defendant*.

To Robert H. Wilson, Judge and Clerk of said Court:

You will please issue special execution in the above-entitled cause, and this shall be your warrant therefor.

(Signed) EMERSON & BRADSHAW,
Attorney's for Plaintiff.

STATE OF COLORADO, } ss:
Ouray County, }

The People of the State of Colorado to the Sheriff of Ouray County, Greeting:

Whereas, by virtue of a certain writ of attachment, issued out of our County Court on the 26th day of April, A. D. 1895, and that on the 26th day of April, 1895, you levied upon the "Yellow Rose" lode, "Crusader" lode, "Norma" lode, "Talisman" lode, "Hidden Treasure" lode, "Gertrude" lode, and "Emily" lode, in Imogene basin, Mt. Sneffles mining district, said county and State; also the mill sites thereof, particularly described in the location certificates thereof, on record with the Clerk and Recorder of said county and State as the property of the Cosmopolitan Mining Company, as appears by your certificate of levy, filed and recorded in this office; and whereas, afterward, to wit, on the 27th day of June, A. D. 1895, by the consideration of our County Court, the A. W. Begole Mercantile Company recovered judgment against the said The Cosmopolitan Mining Company for the sum of two hundred twenty-six $\frac{9}{100}$ dollars, damages, and also the further sum of twenty-four $\frac{58}{100}$ dollars, costs of suit, as appears of record.

We therefore command you, that you immediately proceed to sell the property by you levied upon, as hereinbefore described, or so much thereof as is necessary to make the aforesaid sums of money, with interest on said judgment, from the day of the rendition of the same, and have the same money ready, as soon as may be, to render unto the said Court for adjustment according to law, allowing the several judgment-creditors in proportion to the amount of their several claims as adjusted.

Hereof fail not and make return of this writ, with your doings endorsed thereon, in ninety days from the date hereof.

Witness Robert H. Wilson, Judge and Clerk of said County Court and the seal thereof at Ouray this 23d day of July, A. D. 1895.

[SEAL.] ROBERT H. WILSON,
Judge and Clerk.

STATE OF COLORADO, }
Ouray County, } *ss:*

In obedience to the command of the within execution, I have executed the within writ by offering for sale on the 24th day of August, 1895, in the manner provided by law, and selling the property described in said writ, at public sale at the front door of the court-house in the City and County of Ouray, Colorado, that said mining claims were first offered for sale separately; receiving no bids on said claims I offered the same for sale all together. That in accordance with an agreement entered into by and among the several prorating judgment-creditors, the same was struck off and sold to J. C. Marsh, as trustee, for the several judgment-creditors for the sum of $1,616.97; and I therefore return this execution fully satisfied.

(Signed) MAURICE CORBETT, *Sheriff.*

(The foregoing document was duly endorsed.)

JOHN ASHENFELTER,

vs.

COSMOPOLITAN MINING CO.

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court.

JOHN ASHENFELTER, *Plaintiff*,
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Complaint.

Plaintiff complains and alleges:

I. That the amount involved in this action and for which relief is sought does not exceed the sum of two thousand dollars.

II. That the defendant is a corporation duly incorporated and organized under and by virtue of the laws of the State of Maine, *with its principal office in the State of Colorado, at the City of Ouray at said Ouray County.* And by way of complaint against the defendant the plaintiff alleges:

I. That on or about the 31st day of December, A. D. 1894, the defendant was indebted to the plaintiff in the sum of $47.90, for and upon an account for work and labor done and performed and services rendered by the plaintiff for said defendant at defendant's special instance and request between the 1st day of June, 1894, and the date last aforesaid, which should have been paid for at the completion of such work.

II. That the said sum of $47.90 has not been paid nor any part thereof, and the same is now due and owing from defendant to this plaintiff, together with interest thereon at the rate of 8% per annum from the 31st day of December, 1894.

III. That on or about the 26th day of April, 1895, suit was commenced against the defendant herein by The A. W. Begole Mercantile Company in this court,

wherein a writ of attachment was issued out of this court and a levy made thereunder by the sheriff of said Ouray County attaching all of the real property of the said defendant found in said county.

Therefore plaintiff asks:

1. For judgment against the defendant herein for the said sum of $47.90, together with interest thereon from the 31st day of December, 1894, at 8 per cent per annum.

2. That he may be made a party plaintiff in the said suit hereinabove mentioned and be given like remedies against the defendant herein as the law gives to the original plaintiff in the said action.

3. For costs of this action, and for general relief.

(Signed) EMERSON & BRADSHAW,
Attorneys for the Plaintiff.

(Above document is duly verified and endorsed.)

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court Within and for the County of Ouray aforesaid the Term, A. D. 18 .

JOHN ASHENFELTER,
Plaintiff.
vs.
THE COSMOPOLITAN MINING COMPANY,
a Corporation, *Defendant.*

John Ashenfelter, of said county, being duly sworn, doth depose and say that The Cosmopolitan Mining Co., against whom the said is about to sue out an attachment is indebted to him in a sum not exceeding twenty hundred dollars, to wit, the sum of forty-seven and $\frac{90}{100}$ dollars; and that the said demand is now due and owing and that the sum is due from defendant to plaintiff for and upon an account for work and labor done and performed and services rendered by plaintiff for defendant at defendant's special instance and request, between June 1, 1894, and December 1,

1894, which should have have been paid for at the completion of such work; with interest from Dec. 31, 1894, at 8% per annum.

(Signed) JOHN ASHENFELTER.

Sworn and subscribed to before me this 21st day of May, A. D. 1895.

ROBERT H. WILSON,
Judge and Clerk,

[SEAL.] By MARY F. WILSON,
Deputy Clerk.

(The above document was duly endorsed.)

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court of the State of Colorado Sitting Within and for the County of Ouray.

JOHN ASHENFELTER, *Plaintiff,* *vs.* COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.*	Undertaking on Attachment.

Whereas, the above-named plaintiff has commenced, or is about to commence an action in the County Court within and for the County of Ouray, against the above named defendant, upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of forty-seven and $\frac{90}{100}$ dollars, lawful money of the United States, besides interest, and said plaintiff is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein.

Now, therefore, we, the undersigned residents of the County of Ouray, State of Colorado, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake in the sum of one hundred and ten dollars, lawful money, and promise to the

effect that if the said defendant recover judgment in said action, or if the said court shall finally decide that the said plaintiff was not entitled to an attachment, the said plaintiff will pay all costs that may be awarded to the said defendant and all damages which it may sustain by reason of the wrongful suing out of the said attachment, not exceeding the sum of one hundred and ten dollars. Dated this 21st day of May, A. D. 1895.

(Signed) JOHN ASHENFELTER.
(Signed) GOE M. SEEGER.

(On the back of the foregoing document was a form of jurat but was not filled out. The document was duly endorsed.)

STATE OF COLORADO, } *ss:*
Ouray County, }

In the County Court of the State of Colorado Within and for the County of Ouray.

JOHN ASHENFELTER, *Plaintiff.* *vs.* COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.* } Writ of Attachment.

The People of the State of Colorado to the Sheriff of the said County of Ouray, Greeting:

Whereas, the above-entitled action was commenced in the County Court of the State of Colorado in and for the said County of Ouray, by the plaintiff in the said action, to recover from the defendant Cosmopolitan Mining Company in the said action the sum of forty-seven and $\frac{90}{100}$ dollars, lawful money of the United States, besides interest at the rate of 8 per cent per annum from the 31st day of December, A. D. 1894, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law;

Now, we do therefore command you————, the said sheriff, that you serve a copy hereof on the above defendant, if it be found in your *county*, and also at-

tach and safely keep all the property of said defendant within your said county, not exempt from execution or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above, and in the affidavit herein mentioned, unless the said defendant deposit with you the amount or give you security by an undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs or in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking; and hereof make due and legal service, and return.

Witness Robert H. Wilson, Judge and Clerk of said Court, and the seal thereof, at Ouray, this 21st day of May, A. D. 1895.

[SEAL.] (Signed) ROBERT H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } *ss:*
Ouray County, }

I do hereby certify that I have duly executed the within writ on this 22d day of May, A. D. 1895, by levying upon and attaching all the right, title, interest, claim and demand and equity of redemption of the Cosmopolitan Mining Company, in and to the following real property, to-wit: The Yellow Rose lode, the Crusader lode the Norma lode, the Talisman lode and the Hidden Treasure lode, the Gertrude lode and the Emily lode mining claims, situate in Imogene basin, Mt. Sneffles mining district, County of Ouray and State of Colorado, and also the mill sites and each and every of them in said basin, district, county and State, to said lodes and each and every of them belonging, which said lodes and mill sites are more accurately described in detail and identified by notes and bonds in the book of

record, in and for the Recorder's office of the said County of Ouray and State of Colorado, and to which reference is hereby made. And I further certify that I have filed a true copy of this levy and attachment for record with the Clerk and Recorder in and for said Ouray County, Colorado.

MAURICE CORBETT,
Sheriff.

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } *ss* :
County of Ouray, }

In the County Court.

JOHN ASHENFELTER,
Plaintiff,
vs.
COSMOPOLITAN MINING COMPANY,
a Corporation, *Defendant.*
} Summons.

The People of the State of Colorado to Cosmopolitan Mining Company, the defendant above-named, Greeting :

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the County Court, of Ouray County, State of Colorado, and answer the complaint therein, within twenty *twenty* days after the service hereof if served within this county ; or if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service ; or judgment by default will be taken against you according to the prayer of the complaint.

And if a copy of the complaint in the above-entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover from the defendant the sum of $47.90, with interest from December 31st, 1894, at 8 per cent per annum, amount alleged to be due from the defendant to plantiff on account of work and labor done and performed and services rendered by plantiff for defendant, at its special instance and request, between the 1st day of June, 1894, and the 31st day of December, 1894, as will more fully appear from the complaint in said action to which reference is here made.*

And you are hereby notified that if you fail to appear, and to answer the said complaint as above required, the said plaintiff will take judgment by default against you in accordance with the prayer of said complaint.

Given under my hand and the seal of said Court at Ouray in said county, this 21st day of May, A. D. 1895.

[SEAL.] ROBERT H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

(Index.) *A copy of which is hereto attached.

STATE OF COLORADO, }
County of San Miguel, } *ss:*

I do hereby certify that I have duly served the within summons together with a copy of the complaint in the within-stated action, on this 23d day of May, A. D. 1895, by personally delivering a true copy of said summons, together with a copy of the original complaint in the action therein mentioned, thereto attached, to the within named defendant, J. M. Jardine, *duly authorized agent* for the within-named defendant company.

(Signed) J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

STATE OF COLORADO, County of Ouray, } ss:

In the County Court of the State of Colorado within *in* and for the County of Ouray.

JOHN ASHENFELTER, *Plaintiff*, *vs.* COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Writ of Attachment.

The People of the State of Colorado to the Sheriff of the County of San Miguel, Greeting:

Whereas, *in* the above-entitled action was commenced in the County Court of the State of Colorado in and for the said County of Ouray, by the plaintiff in the said action to recover from the defendant Cosmopolitan Mining Co., in the said action, the sum of forty-seven and $\frac{90}{100}$ dollars, lawful money of the United States, besides interest at the rate of 8 per cent per annum from the 31st day of December, A. D. 1894, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law,

Now, we do therefore command you.————— —— the said sheriff, that you serve a copy hereof on the above defendant, if he *it* be found in your county, and also attach and safely keep all the property of said defendant within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above, and in the affidavit herein mentioned, unless the said defendant deposit with you the amount or give you security by an undertaking of at least two sufficient securities, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached in which case you will take such undertaking; and hereof make due and legal service and return.

Witness Rob't H. Wilson, Judge and Clerk of said

Court, and the seal thereof, at Ouray, this 21st day of May, A. D. 1895.

[SEAL.] (Signed) ROB'T H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, San Miguel County, } *ss:*

I do hereby certify that I have duly executed the within writ on this 23d day of May, A. D. 1895, by delivering a true copy of the within to J. M. Jardine, *duly authorized agent* for the within named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

STATE OF COLORADO, County of Ouray, } *ss:*

In the County Court in and for said County.

JOHN ASHENFELTER, *Plaintiff,* *vs.* COSMOPOLITAN MINING COMPANY, *Defendant.* } Præcipe for Execution.

To Robert H. Wilson, Judge and Clerk of said Court:

You will please issue special execution in the above-entitled cause, and this will be your warrant therefor.

Dated this 23d day of July, A. D. 1895.

(Signed) EMERSON & BRADSHAW,
Plaintiff's Attorneys.

(The foregoing document was duly endorsed.)

JOHN ASHENFELTER, *Plaintiff,* *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.* } 1439. Default.

Now, on this day, being the 27th day of June, 1895,

plaintiff, by his counsel, Emerson & Bradshaw, appeared and filed his application for default herein against the above-named defendant, and it appearing to the court that summons has been served upon one J. M. Jardine, the *heretofore* duly authorized and acting agent for said Company, and that the said defendant has made no appearance herein, and it further appearing that the complaint of plaintiff was duly verified, and that the time for the appearance of said defendant has expired; it is therefore ordered that default do and the same hereby does enter against said defendant.

JOHN ASHENFELTER,
Plaintiff.
vs.
THE COSMOPOLITAN MINING COMPANY,
a Corporation, *Defendant.*
} 1439. Judgment.

Now on this day appeared Emerson & Bradshaw, attorneys for plaintiff, the said defendant appearing not, and moved the court that the said cause came on for hearing upon its merits.

Whereupon the evidence on behalf of plaintiff was introduced before the court without the intervention of a jury. And it appearing to the court that the said defendant is justly indebted to the said plaintiff in the sum of 49 and $\frac{82}{100}$ dollars, including interest to date. And it further appearing that default has been duly entered herein in favor of the plaintiff and against the said defendant; it is therefore ordered by the Court after being fully advised in the premises and after *heard* the testimony of the said plaintiff introduced herein in open court, that the said plaintiff, John Ashenfelter, do have and recover of and from the said defendant, The Cosmopolitan Mining Company, the just and full sum of forty-nine and $\frac{82}{100}$ dollars, together with his costs herein expended, taxed at 22 $\frac{70}{100}$ dollars. And it is further ordered that the attachment herein be sustained. For which judgment let special execution issue.

ROBERT H. WILSON, *Judge.*

STATE OF COLORADO, } ss.:
County of Ouray, }

The People of the State of Colorado to the Sheriff of Ouray County, Greeting:

Whereas, by virtue of a certain writ of attachment, issued out of our County Court on the 21st day of May, A. D. 1895, and that on the 22d day of May, 1895, you levied upon the "Yellow Rose" lode; "Crusader" lode; "Norma" lode; "Talisman" lode; "Hidden Treasure" lode; "Gertrude" lode; and "Emily" lode; situate in Imogene basin, Mt. Sneffles mining district, county and State aforesaid, also the mill sites thereof, more particularly described in the location certificates thereof, of record with the clerk and recorder of said county and State as the property of the Cosmopolitan Mining Co., as appears by your certificate of levy, filed and recorded in this office; and

Whereas, afterward, to wit, on the 27th day of June A. D. 1895, by the consideration of our County Court, John Ashenfelter recovered judgment against the said The Cosmopolitan Mining Co., for the sum of forty-nine $\frac{82}{100}$ dollars damages, and also the further sum of twenty-two $\frac{70}{100}$ dollars, costs of suit, as appears of record.

We therefore command you, that you immediately proceed to sell the property by you levied upon, as hereinbefore described, or so much thereof as is necessary to make the aforesaid sum of money, with interest on said judgment from the day of the rendition of the same; and have the same money ready as soon as may be, to render unto the said court for adjustment among the several judgment-creditors in proportion to the amount of their respective claims according to law.

Hereof fail not, and make return of this writ, with your doings endorsed thereon in ninety days from the date hereof.

Witness Robert H. Wilson, Judge and Clerk of said

County Court, and the seal thereof hereto affixed, at Ouray, this 23d day of July, A. D. 1895.

[SEAL.] ROBERT H. WILSON,
Judge and Clerk.

By
Deputy.

STATE OF COLORADO, } *ss*:
County of Ouray, }

I hereby return the within execution fully satisfied in accordance with my return made on the execution issued in the case of The A. W. Begole Mercantile Company *vs.* The Cosmopolitan Mining Company.

MAURICE CORBETT, *Sheriff.*

(The foregoing document was duly endorsed.)

P. H. FENNELL
vs.
COSMOPOLITAN MINING CO.

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court.

P. H. FENNELL, *Plaintiff,*
vs.
COSMOPOLITAN MINING COMPANY, *Defendant.*
} Complaint.

The plaintiff complains and alleges:

I. That the amount involved in this action and for which relief is sought does not exceed the sum of two thousand dollars.

II. That the defendant is a corporation duly incorporated and organized under and by virtue of the laws of the State of Maine, *with its principal office in the State of Colorado at Ouray, in said Ouray County.*

And for a first cause of action against the defendant the plaintiff alleges:

I. That on or about the 1st day of August, 1894, the defendant was indebted to the plaintiff for and

upon an account for work and labor done and performed by said plaintiff for defendant, at the defendant's special instance and request, between the 30th day of June, 1894, and the date last aforesaid, in the sum of $58.75.

II. That the said sum of $58.75 has not been paid nor any part thereof, and the same is now due and owing from defendant to plaintiff with interest thereon at the rate of 8 per cent per annum from the first day of August, 1894.

And for a second cause of action against the defendant plaintiff alleges:

I. That on or about the 1st day of August, 1894, the defendant was indebted to one John Dowd in the sum of $58.75 for and upon an account for work and labor done and performed by the said Dowd for defendant, at defendant's special instance and request, between the 30th day of June, 1894, and the date last aforesaid.

II. That on or about the 22d day of May, 1895, the said Dowd assigned, transferred and set over said account to this plaintiff for collection.

III. That the said sum of $58.75 has not been paid nor any part thereof, and the same is now due and owing to this plaintiff from defendant together with interest thereon at the rate of 8 per cent per annum from the 1st day of August, 1894.

IV. That on or about the 26th day of April, 1895, suit was commenced against the defendant herein by the A. W. Begole Mercantile Company in this court, wherein a writ of attachment was issued out of this court and a levy made thereunder by the sheriff of said Ouray County, attaching all of the real property of said defendant found in said county.

Wherefore plaintiff demands judgment against the defendant.

1. For the sum of $58.75, together with interest thereon at the rate of 8 per cent per annum from the

first day of August, 1894, as in the first cause of action herein set forth.

2. For the sum of $58.75, together with interest thereon at the rate of 8 per cent per annum, as in the second cause of action herein set forth.

3. For costs of this action, and for general relief.

4. And the plaintiff asks the court further that he be made a party plaintiff in the said suit hereinabove mentioned and be given like remedies against the defendant herein as the law gives to the original plaintiff in the said action.

(Signed) EMERSON & BRADSHAW,
Attorneys for Plaintiff.

(Which complaint was duly verified.)

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } *ss*:
County of Ouray, }

In the County Court Within and for the County of Ouray Aforesaid.

P. H. FENNELL,
Plaintiff,
vs.
COSMOPOLITAN MINING COMPANY,
a Corporation, *Defendant.*

Thomas Y. Bradshaw of said county, being duly sworn, doth depose and say that he is one of plaintiff's attorneys in the above action; that the Cosmopolitan Mining Company, against whom the said P. H. Fennell is about to sue out an attachment is indebted to him in a sum not exceeding twenty hundred dollars, to wit: The sum of one hundred seventeen and $\frac{50}{100}$ dollars and interest; and that the said demand is now wholly due and unpaid and that the same is for and upon account of work and labor done and performed by plaintiff for defendant, at defendant's special instance and request, in the sum of $58.75, and for work and labor done and performed as aforesaid for defendant, at defendant's

special instance and request, by one John Dowd in the sum of $58.75, and said last-named claim has been by said John Dowd assigned to plaintiff herein for collection, all of said work and labor being done and performed during the month of July, 1894; and which should have been paid for at the time of the completion of such work.

(Signed) THOMAS Y. BRADSHAW.

Sworn and subscribed to before me, this 23d day of May, A. D. 1895.

ROB'T H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Dep. Clerk.

[SEAL.]

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court in and for the County of Ouray, in the State Aforesaid.

P. H. FENNELL, *Plaintiff,* *vs.* COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.* } Undertaking on Attachment.

Whereas, the above-named plaintiff has commenced or is about to commence an action in the County Court in and for the County of Ouray, in the State aforesaid, against the above-named defendant upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of one hundred seventeen and $\frac{50}{100}$ dollars, lawful money of the United States, besides interest, and said plaintiff is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein.

Now, therefore, we, the undersigned, residents of the County of Ouray, State of Colorado, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake in the sum of two hundred and fifty dollars and promise to the effect that if the said defendant recover judgment in said action, or if the said court shall finally decide that the plaintiff was not entitled to an attachment, the said plaintiff will pay all costs that may be awarded to the said defendant and all damages which it may sustain by reason of the wrongful suing out of the said attachment, not exceeding the sum of two hundred fifty dollars.

Dated this 23d day of May, A. D. 1895.

(Signed) T. W. KNOWLES.

(Signed) W. H. FOURRELL.

(On the back of the foregoing document was a form of jurat but not filled out. The document was duly endorsed.)

STATE OF COLORADO, } *ss*:
County of Ouray, }

In the County Court Within and for the County of Ouray, State of Colorado.

P. H. FENNELL, *Plaintiff*,
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Writ of Attachment.

The People of the State of Colorado to the Sheriff of the said County of Ouray, Greeting:

Whereas, the above-entitled action was commenced in the County Court in and for the said County of Ouray in the State of Colorado by the plaintiff in the said action to recover from the defendant, Cosmopolitan Mining Co., in the said action the sum of one hundred and seventeen and $\frac{50}{100}$ dollars, lawful money of the United States, besides interest at the rate of 8 per

cent per annum, from the first day of August, A. D. 1894, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law.

Now, we do therefore command you, the said sheriff, that you serve a copy hereof on the above defendant, if it be found in your county, and also attach and safely keep all the property of said defendant within your county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above mentioned; unless the said defendant deposit with you an amount or give you security by an undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking, and hereof make due and legal service and return.

Witness Rob't H. Wilson, judge and clerk of said court, and the seal thereof at Ouray, this 23d day of May, A. D. 1895.

ROB'T H. WILSON,
Judge and Clerk.

[SEAL.]

By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } *ss* :
Ouray County, }

I do certify that I have duly executed the within writ on this 23rd day of May, A. D. 1895, by levying upon and attaching all the right, title, interest, claim and demand and equity of redemption of the Cosmopolitan Mining Company in and to the following-described real property to wit: The Yellow Rose lode, the Crusader lode, the Norma lode, the Talisman lode, the Hidden Treasure lode, the Gertrude lode and the Emily lode mining claims, situated in Imogene basin, Mt. Sneffles mining district, County of Ouray and State of Colorado;

and also the mill sites and each and every of them in said basin, district, county and State, and to said lodes and each and every of them belonging, which said lodes and mill sites are more accurately described in detail and identified by metes and bounds in the books of record in and for the recorder's office of the said County of Ouray and the State of Colorado, to which records reference is hereby made.

And I further certify that I have further executed the within writ by delivering a true copy hereof to and filing the same with the clerk and recorder of said Ouray County.

MAURICE CORBETT, *Sheriff.*

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court.

P. H. FENNELL,
Plaintiff,
vs.
COSMOPOLITAN MINING COMPANY,
a Corporation, *Defendant.*
} Summons.

The People of the State of Colorado to Cosmopolitan Mining Co. the defendant above-named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plantiff in the County Court of Ouray County, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county, or if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint. And if a copy of the complaint in the above-entitled action be not served with this summons or if the service hereof be made out of this State, then ten days

additional to the time hereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover from the defendant the sum of $117.50, and interest thereon from the 1st day of August, 1894, at 8 per cent per annum, amount alleged to be due the plaintiff from the defendant to the plaintiff for and upon an account for work and labor done and performed by said plaintiff for defendant, at defendant's special instance and request, between the 1st day of June, 1894, and the 1st day of August 1894, in the sum of $58.75; and also the sum of $58.75 due to one John Dowd for and upon an account for work and labor done and performed as aforesaid between the dates aforesaid and by the said John Dowd assigned to this plaintiff for collection, as will more fully appear from the complaint in said action, to which reference is here made.*

And you are hereby notified that if you fail to appear, and to answer the said complaint as above required, the said plaintiff will take judgment against you by default in accordance with the prayer of said complaint.

Given under my hand and the seal of said court at Ouray in said County, this 23d day of May, 1895.

[SEAL.] ROB'T H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

(Index.) *A copy of which is hereto attached.

STATE OF COLORADO, } ss:
County of San Miguel, }

I do hereby certify that I have duly served the within summons, together with a copy of the complaint in the within-stated action, on this 27th day of May, A. D. 1895, by personally delivering a true copy of said

summons, together with a copy of the original complaint in the action therein mentioned, thereto attached, to J. M. Jardine, *he being the duly authorized agent* for the within-named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was fully endorsed.)

STATE OF COLORADO, Ouray County, } *ss*:

In the County Court Within and for the County of Ouray, in the State of Colorado.

P. H. FENNELL, *Plaintiff*, *vs.* COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.* } Writ of Attachment.

The People of the State of Colorado to the Sheriff of the County of San Miguel, Greeting:

Whereas the above-entitled action was commenced in the County Court in and for the said County of Ouray in the State of Colorado, by the plaintiff in the said action to recover from the defendant Cosmopolitan Mining Company, in the said action, the sum of one hundred seventeen and $\frac{50}{100}$ dollars lawful money of the United States, besides interest at the rate of 8 per cent per annum from the first day of August, A. D. 1894, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law;

Now, we do therefore command you, the said sheriff, that you serve a copy hereof on the above defendant, if it be found in your county, and also attach and safely keep all the property of said defendant within your said county not exempt from execution or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above, and in the affidavit herein mentioned unless the said defendant deposit with you the amount or give you security by an undertaking of at least two sufficient sureties in an amount sufficient to satisfy

such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking and hereof make due and legal service and return.

Witness Robert H. Wilson, Judge and Clerk of said court, and the seal thereof, at Ouray aforesaid, this 23rd day of May, A. D. 1895.

[SEAL.] (Signatures next page.)

ROBERT H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } *ss*:
San Miguel County, }

I do hereby certify that I have duly executed the within writ on this 27th day of May, A. D. 1895, by delivering a true copy of same to J. M. Jardine, *he being the duly authorized* agent for the within-named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

P. H. FENNELL,
Plaintiff,
vs.
THE COSMOPOLITAN MINING CO.,
a Corporation, *Defendant.*
} 1440. Default.

Now on this 10th day of July, 1895, plaintiff, by his counsel, Emerson & Bradshaw, appeared and filed his application for default against the above-named defendant, and it appearing to the Court that summons has been served upon one J. M. Jardine, the *heretofore* duly authorized and acting agent for said company, and that said defendant has made no appearance herein; and it further appearing that the complaint of plaintiff is duly verified and that the time for the appearance of said defendant has expired; it is therefore ordered that default do and the same hereby does enter against said defendant.

P. H. FENNELL,
Plaintiff,
vs.
THE COSMOPOLITAN MINING CO.,
a Corporation, *Defendant.*
} 1440. Judgment.

Now on this day appeared Emerson & Bradshaw, attorneys for plaintiff, the said defendant appearing not, and moved the Court that the said cause come on for a hearing upon its merits; whereupon the evidence on behalf of plaintiff was introduced before the Court without the intervention of a jury. And it appearing to the Court that the said defendant is justly indebted to the said plaintiff in the sum of 126 and $\frac{1}{100}$ dollars, including interest to date; and it further appearing that default has been duly entered herein in favor of the plaintiff and against the said defendant,

It is therefore ordered by the Court after being fully advised in the premises and after having heard the testimony of the said plaintiff, introduced herein in open court that the said plaintiff, P. H. Fennell, do have and recover of and from the said defendant, the Cosmopolitan Mining Company, the just and full sum of one hundred twenty-six and $\frac{1}{100}$ dollars, together with his costs therein expended, taxed at 22$\frac{11}{100}$ dollars. And it is further ordered that the attachment herein be sustained. For which let special execution issue. ROBERT H. WILSON, *Judge.*

STATE OF COLORADO,
Ouray County,
} *ss:*

In the County Court in and for said County.

P. H. FENNELL,
Plaintiff,
vs.
COSMOPOLITAN MINING COMPANY,
Defendant.
} Praecipe for Execution.

To Rob't H. Wilson, Judge and Clerk of said Court.

You will please issue special execution in the above.

entitled cause and this shall be your warrant therefor.
Dated this 23rd day of July, A. D. 1895.

(Signed) EMERSON & BRADSHAW,
Plaintiff's Attorneys.

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } ss:
Ouray County, }

The People of the State of Colorado to the Sheriff of Ouray County, Greeting:

Whereas, by virtue of a certain writ, of attachment, issued out of our County Court on the 23d day of May, A. D. 1895, and that on the 23d day of May, 1895, you levied upon the Yellow Rose lode, Crusader lode, Norma lode, Talisman lode, Hidden Treasure lode, Gertrude lode, and the Emily lode, all situated in Imogene Basin, Mt. Sneffles mining district, county and State aforesaid all *all* mill sites thereunto belonging, more particularly described in the location certificates thereof on record with the clerk and recorder of said County and State as the property of The Cosmopolitan Mining Co., as appears by your certificate of levy, filed and recorded in this office; and whereas, afterward, to wit, on the 10th day of July, A. D. 1895, by the consideration of our County Court, P. H. Fennell recovered judgment against the said The Cosmopolitan Mining Co., for the sum of one hundred and twenty-six and $\frac{12}{100}$ dollars damages, and also the further sum of twenty-two and $\frac{12}{100}$ dollars costs of suit, as appears of record.

We therefore command you, that you immediately proceed to sell the property by you levied upon, as hereinbefore described, or so much thereof as is necessary to make the aforesaid sums of money, with interest on said judgment from the day of the rendition of the same; and have the said money ready, as soon as may be, to render unto the said court for adjustment among the several judgment-creditors in proportion to

the amount of their respective claims according to law.

Hereof fail not, and make return to this writ, with your doings endorsed thereon in ninety days from the date hereof.

Witness Rob't H. Wilson, Judge and Clerk of our said County Court, and seal thereof, at Ouray, this 23d day of July, A. D. 1895.

[SEAL.] ROB'T H. WILSON,
Judge and Clerk.

STATE OF COLORADO, } *ss*:
Ouray County, }

I hereby return the within execution fully satisfied in accordance with my return made on the execution issued in the case of the A. W. Begole Mercantile Company *vs.* The Cosmopolitan Mining Company, this 30th day of September, 1895.

(Signed) MAURICE CORBETT,
Sheriff.

(The foregoing document was duly endorsed.)

WILLIAM C. FULTON,
vs.
COSMOPOLITAN MINING COMPANY.

STATE OF COLORADO, } *ss*:
County of Ouray, }

In the County Court.

WILLIAM C. FULTON, *Plaintiff*,
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Complaint.

Plaintiff complains and alleges:

1st. That the amount involved in this action does not exceed the sum of two thousand dollars.

2nd. *That the defendant is a corporation duly organized under the laws of*

III. That on the 4th of November, 1893, at Ouray County aforesaid, the defendant was indebted to one

John Lillar, in the sum of nine hundred twenty-two and ⅘ dollars, upon an account for work and labor performed in and about the working and development of the Hidden Treasure mine belonging to the defendant upon a contract express * * * that said work and labor and material was reasonably worth, and the defendant agreed to pay for the same, the said sum of $922.80.

IV. That prior to the beginning of this action the said claim and account was, for value, assigned to the plaintiff.

V. That the defendant has not paid the same nor any part thereof.

Whereof, plaintiff prays judgment for the said sum of $922.80 with interest thereon from the said 4th day of November, 1893, and for costs of suit.

(Signed) STORY & STEVENS,
Attorneys for Plaintiff.

(The foregoing complaint was duly verified and endorsed.)

STATE OF COLORADO, }
County of Ouray, } *ss:*

In the County Court Within and for the County of Ouray Aforesaid, the Term, A. D. 1895.

WILLIAM C. FULTON,
Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY,
a Corporation, *Defendant.*

William C. Fulton of said county, being duly sworn, doth depose and say that the defendant, The Cosmopolitan Mining Company, against whom the said William C. Fulton is about to sue out an attachment, is indebted to him in a sum not exceeding ten hundred dollars, to wit, the sum of nine hundred twenty-two and ⅘ dollars and that the said demand is and unpaid on an express contract, and that the said sum of

$922.80 is due from defendant to plaintiff, for work and labor performed by John Lillar, for said defendant at its request; that the said claim was by the said John Lillar for value assigned to the plaintiff; that said sum is *do* on a written order of the agent of said corporation, for the direct and unconditional payment of money; *that the defendant is a foreign corporation.*

(Signed) W. C. FULTON.

Sworn and subscribed to before me, this 25th day of May, A. D. 1895.

[SEAL.] ROBERT H. WILSON,
County Judge and Clerk Co. Come.

(The foregoing paper was duly endorsed.)

STATE OF COLORADO, } *ss:*
Ouray County, }

In the County Court in and for the County of Ouray, in the State Aforesaid.

WM. C. FULTON, *Plaintiff,* *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.*	Undertaking on Attachment.

Whereas, the above-named plaintiff has commenced, or is about to commence an action in the County Court in and for the County of Ouray, in the State aforesaid, against the above-named defendant, upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of nine hundred twenty-two and 80/100 dollars, lawful money of the United States, besides interest, and the plaintiff is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein.

Now, therefore, we, the undersigned, residents of the County of Ouray, State of Colorado, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake in the sum of eighteen

hundred and fifty dollars and promise to the effect, that if the said defendant shall recover judgment in said action, or if the said court shall finally decide that the said plaintiff was not entitled to an attachment, the said plaintiff will pay all costs that may be awarded to the said defendant Company and all damages which it may sustain by reason of the wrongful suing out of the said attachment, not exceeding the sum of eighteen hundred and fifty dollars.

Dated this 25th day of May, A. D. 1895.

W. C. FULTON.
E. H. POWELL.
J. C. MARSH.

(On the back of the foregoing document was the oath as to the worth of sureties, not filled out, but signed "E. H. Powell" and "J. C. Marsh." The document was also endorsed.)

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court.

WILLIAM C. FULTON, *Plaintiff,* *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.* } Summons.

The People of the State of Colorado to the Cosmopolitan Mining Company, a Corporation, the defendant above-named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the County Court of Ouray County, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county, or if served out of this county or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint.

And if a copy of the complaint in the above-entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover from you the sum of $922.80 upon an account for work and labor performed by one John Lillar, at your request, and for which you agreed to pay said sum of $922.80 which said account has been for value, assigned to the plaintiff, as will more fully appear from the complaint in said action to which reference is here made, a copy of which is attached hereto.

And you are hereby notified that if you fail to appear and to answer the said complaint as above required, the said plaintiff will take default and judgment against you according to the prayer of the complaint.

Given under my hand and the seal of said court at Ouray in said county, this 13th day of June, A. D. 1895.

[SEAL.] **ROB'T H. WILSON,**
Judge and Clerk.
MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, }
County of San Miguel, } *ss:*

I do hereby certify that I have duly served the within summons, together with a copy of the complaint in the within-stated action on this 22d day of June, A. D. 1895, by personally delivering a true copy of said summons, together with a copy of the original complaint in the action therein mentioned, thereto attached, to the within-named defendant, J. M. Jardine, *he being the duly authorized agent* for the within-named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

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STATE OF COLORADO, } ss:
County of Ouray. }

In the County Court Within and for the County of Ouray, State of Colorado.

WM. C. FULTON, *Plaintiff*,
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*.

Writ of Attachment.

The People of the State of Colorado to the Sheriff of the said County of *Ouray*, Greeting:

Whereas, the above-entitled action was commenced in the County Court in and for the said County of Ouray, in the State of Colorado, by the plaintiff in the said action, to recover from the defendant, The Cosmopolitan Mining Co., a corporation, in the said action, the sum of nine hundred twenty-two and ⅔ dollars, lawful money of the United States, besides interest at the rate of per cent per from the day of , A. D. 189 , and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law;

Now, we do therefore command you, the said sheriff, that you serve a copy hereof on the above defendant, if *he* be found in your county, and also attach and safely keep all the property of said defendant, The Cosmopolitan Mining Co., a corporation, within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above, and in the affidavit herein mentioned, unless the said defendant deposit with you the amount or give you security by an undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking; and hereof make due and legal service and return.

Witness Rob't H. Wilson, Judge and Clerk of said Court, and the seal thereof, at Ouray, this 13th day of June, A. D. 1895.

[SEAL.] ROB'T H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } *ss:*
San Miguel County, }

I do hereby certify that I have duly executed the within writ on this 22d day of June, A. D. 1895, by delivering to J. M. Jardine, a true copy of same, *he being the duly authorized agent* for the within-named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

W. C. FULTON,
vs.
THE COSMOPOLITAN MINING COMPANY. } 1443. Default.

Now on this 26th day of July, 1895, plaintiff by his counsel, Story & Stevens, appeared and filed his application for default herein against the above-named defendant; and it appearing to the court that summons has been served upon one J. M. Jardine, the *heretofore* authorized and acting agent for said company; and that the said defendant has made no appearance herein; and it further appearing that the complaint of plaintiff herein is duly verified, and that the time for appearance of said defendant has expired; it is therefore ordered that default do and the same does hereby enter against said defendant.

W. C. FULTON,
vs.
THE COSMOPOLITAN MINING CO. } 1443. Judgment.

Now on this day appeared Story & Stevens, attorneys for plaintiff, the said defendant appearing not, and

moved the court that the said cause come on for hearing upon its merits; whereupon the evidence on behalf of plaintiff was introduced before the court without the intervention of a jury; and it appearing to the court that the said defendant is justly indebted to the said plaintiff in the sum of 1,049 and $\frac{75}{100}$ dollars including interest to date. And it further appearing that default has been duly entered in favor of plaintiff and against said defendant.

It is therefore ordered by the court, after being fully advised in the premises, and after having heard the testimony of the said plaintiff introduced herein in open court that the said plaintiff, W. C. Fulton, do have and recover of and from the said defendant, the Cosmopolitan Mining Company, the just and full sum of ten hundred forty-nine and $\frac{75}{100}$ dollars, together with his costs herein taxed at —— dollars. And it is further ordered that the attachment herein be sustained. For which let special execution issue.

STATE OF COLORADO, } ss:
Ouray County, }

The People of the State of Colorado to the Sheriff of Ouray County, Greeting:

We command you, that of the lands and tenements, goods and chattels, of The Cosmopolitan Mining Company, defendant, in your county, you cause to be made the sum of one thousand and forty-nine and $\frac{75}{100}$ dollars, which W. C. Fulton, plaintiff, lately in the County Court of said Ouray County, at a term thereof begun and held at Ouray in said county, on the 26th day of July, A. D. 1895, recovered against the said defendant, and which by the said Court was adjudged to the said plaintiff for his damages by him in his behalf sustained, together with interest upon said judgment from the date of the recovery thereof until the same is paid at the rate of 8 per cent per annum. And also, the further sum of fifteen dollars and forty cents, which were adjusted to

the said plaintiff for his costs and charges in that behalf expended, whereof the said defendant is convicted, as appears to us of record. And have you these moneys ready to render to the said court for damages for adjustment among the several judgment-creditors in proportion to the amount of their respective claims and costs aforesaid and make return of this writ, with an endorsement thereon in what manner you shall have executed the same, within ninety days of the date hereof.

Witness Rob't H. Wilson, judge and clerk of said court, and the seal thereof, at Ouray, in said county, this 27th day of July, A. D. 1895.

ROB'T H. WILSON,
Judge and Clerk.

STATE OF COLORADO, } *ss:*
Ouray County, }

I hereby return the within execution fully satisfied in accordance with my return made on the execution issued in the case of The A. W. Begole Mercantile Company *vs.* The Cosmopolitan Mining Company, this 30th day of September, 1895.

(Signed) MAURICE CORBETT,
Sheriff.

(The foregoing document was duly endorsed.)

THOMAS F. WALSH,
vs.
COSMOPOLITAN MINING CO. *et al.*

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the District Court of the Seventh Judicial District of the State of Colorado, Sitting Within and for the County of Ouray Aforesaid.

THOMAS F. WALSH, *Plaintiff,*
vs.
THE COSMOPOLITAN MINING COMPANY and J. M. JARDINE, *Defendants.*

Be it remembered, that on the first day of March,

A. D. 1897, there was filed in the office of the Clerk of said District Court in said cause a certain complaint in words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Ouray, }

In the District Court thereof.

THOMAS F. WALSH, *Plaintiff*,
vs.
THE COSMOPOLITAN MINING COMPANY and J. M. JARDINE, *Defendants*.

Plaintiff complains and alleges:

First. *That the defendant is a corporation organized under the laws of the State of Maine, for the purpose, among others, of carrying on a mining business in the County of Ouray and State of Colorado, and by certificate dated December 16, 1885, recorded in Book C-1, page 291, on January 21, 1886, the said J. M. Jardine afterwards was, as required by the laws of the State of Colorado, duly appointed as the authorized agent of the defendant company, upon whom process might be served.*

Second. That during the months of April and May A. D. 1895, the A. W. Begole Mercantile Company, John Ashenfelter, P. H. Fennell *et al*, commenced their certain actions in the County Court of Ouray County aforesaid against the defendant company above named, and in said actions summons were duly issued and the necessary affidavits and undertakings having been duly given, writs of attachment were duly issued in each of said actions and levied upon the property hereinafter described, and in said actions and each of them the summons and writs of attachment were duly served upon the defendant company *by delivering the same to the* said J. M. Jardine *as the agent of the defendant company.*

Third. That in said actions, and each of them, judgments were duly had and entered in said court against

the defendant company, and on the 23d day of July, 1895, special execution was duly issued out of said County Court in that certain action in which The A. W. Begole Mercantile Company was plaintiff and The Cosmopolitan Mining Company was defendant, and said property hereinafter described was duly levied upon, advertised and sold by the then sheriff of Ouray County to one J. C. Marsh as trustee, and a certificate of purchase duly issued to him.

Fourth. That afterwards, the said Marsh, for a valuable consideration, duly assigned said certificate of purchase to one Stephen A. Osborn, and on May 25, 1896, the time of redemption having expired, the then sheriff of Ouray County duly executed and delivered to Stephen A. Osborn a sheriff's deed for the premises hereinafter described.

Fifth. That on June 16, 1896, the plaintiff herein purchased from the said Stephen A. Osborn for the sum of ten thousand ($10,000) dollars, all of the premises in said sheriff's deed mentioned, to-wit: The Yellow Rose mining claim; the Crusader lode mining claim; the Talisman lode mining claim; the Hidden Treasurer lode mining claim; the Gertrude lode mining claim, and the Emily lode mining claim, together with the several mill sites patented in connection with said lode mining claims, and each of them, all situate in Imogene basin in Mt. Sneffles mining district, in the County of Ouray and State of Colorado, being the premises particularly described in that certain deed of conveyance executed by one Thomas F. Wentworth to the Cosmopolitan Mining Company on July 8, 1890, which deed is of record in the office of the clerk and recorder of Ouray County aforesaid in Book 57 at page 240, as will appear by said deed conveying said premises from the said Stephen A. Osborn to the plaintiff herein, recorded in Book 62 at page 320, on the 30th day of November, 1896, in the office of the clerk and recorder of

Ouray County aforesaid, being the premises levied upon in the said several writs of attachment issued against the Cosmopolitan Mining Company aforesaid, and duly sold by the sheriff on August the 24th, 1895, as above set forth.

Sixth. That the plaintiff is now in the actual peaceable possession of the above-described premises, and is the owner in the fee thereof, and is engaged in working and developing the mining claims aforesaid, and is expending thereon divers large sums of money for the purpose of proving and establishing their value as mining claims aforesaid.

Seventh. That notwithstanding the proceedings in all and each of said actions in said county court were in all respects lawful and valid and within the jurisdiction of said court, and notwithstanding no appeal was taken, or bill of exceptions filed, and the time for so doing has long since elapsed, the defendants and each of them pretend and claim that they still hold some interest in said real property above described, adverse to the said claim of the plaintiff and thereby prevent the plaintiff from obtaining the necessary assistance and capital required for the purpose of developing the same.

Wherefore plaintiff prays judgment:

First. That said defendants and each of them may be required to come into court and specify the nature of their claims and have them finally adjudicated.

Second. That on the final hearing it may be determined that said defendants have not, nor have either of them, any interest, right, title, claim or demand to the premises above described, or any part thereof.

Third. For general relief.

(Signed) STORY & STEVENS,
Attorneys for Plaintiff.

(Above is duly verified and endorsed.)

Be it further remembered, that on the 25th day of

March, A. D. 1897, there was filed in the office of the clerk of said District Court, in said cause, a certain summons, which, with the return endorsed thereon, is in words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Ouray, }

In the District Court.

THOS. F. WALSH, *Plaintiff*,
vs.
THE COSMOPOLITAN MINING CO., and J. M. JARDINE, *Defendants*. } Summons.

The People of the State of Colorado to The Cosmopolitan Mining Company and J. M. Jardine, the defendants above-named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the District Court of Ouray County, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county; or, if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint. And if a copy of the complaint in the above-entitled action be not servedwith this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to obtain a decree quieting the title of plaintiff to the "Yellow Rose," "Crusader," "Talisman," Hidden Treasure, Gertrude and Emily lode mining claims, together with the several mill sites patented in connection with said lode mining claims all of said mining claims being in Imogene basin in Mt. Sneffles Mining District in the County of Ouray and State of

Colorado, as will more fully appear from the complaint in said action to which reference is here made. And * a copy of which is hereto attached. And you are hereby notified that if you fail to appear and to answer the said complaint as above required, the said plaintiff will enter a default against you and apply to the court for the relief demanded in the complaint.

Given under my hand and the seal of said court, at Ouray, in said County, this 1st day of March, A.D.1897.

[SEAL.] (Signed)

JAS. W. ABBOTT, *Clerk*,

By JOHN MAQUILKEN, *Deputy*

(Index.) * A copy of which is hereto attached.

(On the back of the foregoing was the following:)

STATE OF COLORADO, } *ss.*
County of Ouray. }

I do hereby certify that I have duly served the within summons * together with a copy of the complaint in the within-stated action, on this 4th day of March, A. D. 1897, by personally delivering a true copy of said summons, * together with a copy of the original complaint in the action therein mentioned, thereto attached, to the within-named defendants the Cosmopolitan Mining Company and the said J. M. Jardine, at Ouray, in said County. I further certify that the service of the summons and complaint upon the Cosmopolitan Mining Company, was made by delivering to John M. Jardine, *the duly authorized agent of the defendant company and designated by it as the person upon whom service should be made*, a copy of said summons with a copy of the complaint attached specially for said defendant company.

(Signed) W. J. BENTON, *Sheriff*,

By JOHN MAQUILKEN, *Under Sheriff*.

(Index) * Erase if copy of complaint is not served.

(The foregoing document was duly endorsed.)

Be it further remembered, that on the 5th day of March, A. D. 1897, there was filed in the office of the clerk of said District Court, in said cause, a certain answer, in words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Ouray, }

In the District Court.

THOMAS F. WALSH,
Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY,
and J. M. JARDINE, *Defendants*.

Now comes the defendant, J. M. Jarnine, and for answer to the complaint filed herein, says:

FIRST. That the only interest he has had in this matter grows out of the fact that the summons in each of the original actions in the complaint mentioned was served upon him as agent of the defendant company, and that upon said writ being so served upon him, he duly mailed the same to the president of the defendant company, with postage fully paid, in envelopes with return card printed thereon. That said letters were not returned to this defendant, nor was he instructed in any manner by the defendant company, or its officers to defend said actions, nor did he have any knowledge of facts on which said actions could be defended, *and therefore*, allowed judgments in said action to be taken without interposing any defence on the merits. That since the entry of said judgment and the sale of the premises in the complaint thereunder he has not claimed, nor pretended to claim any interest in said premises adverse to the plaintiff.

Wherefore he prays to be dismissed with his costs.

(Signed) J. M. JARDINE, *Pro Se.*

(Above document is duly verified and endorsed.)

Be it further remembered, that on the 25th day of March, A. D. 1897, there was filed in the office of the clerk of said court in said cause, a certain præcipe which is in words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Ouray, }

In the District Court within and for said County and State.

THOMAS T. WALSH *Plaintiff*,
vs.
THE COSMOPOLITAN MINING COMPANY, and J. M. JARDINE, *Defendants*.

To——————————Clerk of said Court:

You will please enter the default of the defendant, The Cosmopolitan Mining Company, in the above entitled cause, and this shall be your warrant therefor.

Dated March 25, 1897.

(signed) STORY & STEVENS,
Attorneys for Plaintiff.

(The above document was duly endorsed.)

Be it further remembered, that on the 25th day of March, 1897, there was entered in the default record in the office of the Clerk of said District Court, in said cause, a certain order in words and figures following, to wit:

THOMAS F. WALSH, *Plaintiff*,
vs.
THE COSMOPOLITAN MINING COMPANY and J. M. JARDINE, *Defendants*. } 957. In vacation.

In this action the defendant The Cosmopolitan Mining Company, having been regularly served with process and having failed to appear and answer the plaintiff's complaint in this behalf, the legal time for answering having expired and no answer, motion or demurrer having been filed; upon application to the clerk by Story & Stevens, Esquires, attorneys for said plaintiff,

the default of said defendant, The Cosmopolitan Mining Company, in the premises is hereby duly entered according to law.

Done in vacation, this 25th day of March, A. D. 1897, by the clerk of said court.

Attest :

JAMES W. ABBOTT, *Clerk.*
By F. W. ABBOTT, *Deputy.*

Convenement.

The regular May term of the District Court of the Seventh Judicial District of the State of Colorado, sitting within and for the County of Ouray, convenes at the court-house in the city of Ouray on the 11th day of May, A. D. 1897, there being present the following officers :

HON. W. H. GABBERT, *Judge.*
W. J. BENTON, *Sheriff.*
JAMES W. ABBOTT, *Clerk,*
By F. W. ABBOTT, *Deputy.*

Be it remembered that on the 11th day of May, A. D. 1897, it being one of the regular juridicial days of the May term, A. D. 1897, of said District Court, to wit, the first day of said term, the following order and decree was entered of record in said Court in said cause, to wit :

THOMAS *H.* WALSH
vs.
THE COSMOPOLITAN MINING COMPANY and J. M. JARDINE. } 957.

Now on this day this cause comes on to be heard by the court upon the verified complaint of the plaintiff, the answer of the defendant J. M. Jardine, and the default of the defendant, The Cosmopolitan Mining Company, duly entered herein for the failure of the said defendant to plead as required by law, after due service of summons upon it in manner and form as by law provided.

And thereupon the said plaintiff was duly sworn as a witness in said cause. And the court having heard

the testimony given by him and inspected the records, deeds, and documents offered in evidence, doth find:

FIRST. That the defendant is a corporation organized under the laws of the State of Maine for the purpose, among others, of carrying on a mining business in the County of Ouray and State of Colorado, and by certificate dated December 16, 1885, recorded in Book C-1, page 291, on January 21, 1896, the said J. M. Jardine afterwards was, as required by the laws of the State of Colorado, duly appointed as the authorized agent of the defendant company upon whom process might be served.

Second. That during the months of April and May, A. D. 1895, The A. W. Begole Mercantile Company, John Ashenfelter, P. H. Fennell, *et al.*, commenced their certain actions in the County Court of Ouray County aforesaid, against the defendant company above named, and in said actions summons were duly issued and the necessary affidavits and undertakings having been duly given, writs of attachment were duly issued in each of said actions and levied upon the property hereinafter described, and in said actions and each of them the said summons and writs of attachment were duly served upon the defendant company by delivering the same to the said J. M. Jardine as the agent of the defendant company.

Third. That in said actions, and each of them, judgments were duly had and entered in said court against the defendant company and on the 23d day of July, 1895, special execution was duly issued out of said County Court in that certain action in which The A. W. Begole Mercantile Company was plaintiff, and the Cosmopolitan Mining Company was defendant, and said property hereinafter described was duly levied upon, advertised and sold by the then sheriff of Ouray County to one J. C. Marsh, as trustee, and a certificate of purchase duly issued to him.

Fourth. That afterwards, the said Marsh, for a valuable consideration, duly assigned said certificate of purchase to one Stephen A. Osborn, and on May 25th, 1896, the time of redemption having expired, the then sheriff of Ouray County duly executed and delivered to Stephen A. Osborn a sheriff's deed for the premises hereinafter described.

Fifth. That on June 16, 1896, the plaintiff herein purchased from the said Stephen A. Osborn for the sum of ten thousand ($10,000) dollars all of the premises in said sheriff's deed mentioned, to wit: The Yellow Rose lode mining claim; the Crusader lode mining claim; the Talisman lode mining claim; The Hidden Treasure lode mining claim; the Gertrude lode mining claim, and the Emily lode mining claim, together with the several mill sites patented in connection with said lode mining claims, and each of them, all situate in Imogene basin in Mt. Sneffles mining district, in the County of Ouray and State of Colorado, being the premises particularly described in that certain deed of conveyance executed by one Thomas F. Wentworth to The Cosmopolitan Mining Company on July 8, 1890, which deed is of record in the office of the clerk and recorder of Ouray County, in Book 57, at page 240, as will appear by said deed conveying said premises from the said Stephen A. Osborn to the plaintiff herein, recorded in Book 62, at page 326, on the 30th day of November, 1896, in the office of the clerk and recorder of Ouray County aforesaid, and being the premises levied upon in the said several writs of attachment issued against The Cosmopolitan Mining Company aforesaid, and duly sold by the sheriff on August 24, 1895, as above set forth.

Sixth. That the plaintiff is now in the actual peaceable possession of the above described premises, and is the owner in fee thereof, and is engaged in working and developing the mining claims aforesaid, and is expending thereon divers large sums of money for the

purpose of proving and establishing their value as mining claims aforesaid.

Seventh. That notwithstanding the proceedings in all and each of said actions in said county court were in all respects lawful and valid and within the jurisdiction of said court, and notwithstanding no appeal was taken, or bill of exceptions filed and the time for so doing has long since elapsed, the defendant, The Cosmopolitan Mining Co., pretends and claims that it still holds some interest in said real property above described, adverse to the claim of the plaintiff and thereby prevents the plaintiff from obtaining the necessary assistance and capital required for the purpose of developing the same.

It is therefore considered, adjudged, and decreed by the court that the said defendants have not, nor have either of them any right title interest, claim or demand in or to any part of the premises above described, and that the pretended claim of the defendant, The Cosmopolitan Mining Company, in and to said premises is wholly without right, or justification in law. That the plaintiff is the owner and in the possession of the premises and mining claims above described and entitled to the quiet and peaceable possession of said mining claims and each of them.

It is further considered that the plaintiff pay the costs of this proceeding. And thereupon on application of the plaintiff, permission is given to him to withdraw the documentary evidence offered by him on the trial of this cause.

STORY & STEVENS.

Service on Foreign Corporations.

"A summons shall be served as follows:

"Ninth. If the action be against a foreign corporation or joint stock company or association, organized under the laws of another State or territory *and doing business within this State*, the summons shall be served by delivering a copy to any agent of such corporation, company or association *found within the county* in which the action is brought, if no such agent be found in such county then by delivering a copy of the summons to any stockholder *who may be found in the county*."

Sec. 38, Subdivision Ninth, Mills' Annotated Code.

Service Outside County in Certain Actions.

Sec 38*b*. "All acts or parts of acts inconsistent with the provisions of this act are hereby repealed; but nothing herein contained shall be held to repeal any provision of law, now in force, which authorizes or permits a summons to be served in any other county of the State than that which the action is brought."

L. 91, p. 83, 3, Amending Code, 1887, 38.

Appointment of Process Agent and Designation of Place of Business.

Sec. 499. "Foreign corporations shall, before they are authorized or permitted to do business in this State, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of the Recorder of Deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served."

Sec. 499, Mills' Annotated Statutes.

Title of Code.

The law enacting the present Code of Colorado has the following title:

"AN ACT

(For an Act) to provide a code of procedure in civil actions for courts of record in the State of Colorado, and to repeal all acts inconsistent therewith."

Mills' Ann. Code, page 1.

Service by Publication.

Section 41 of the Colorado Code, so far as it is pertinent, reads as follows:

Sec. 41. "Service by publication shall be allowed only after summons issued and return thereon made, that the defendant, after diligent search cannot be found. After such return, not less than ten days after issue of summons, publication shall be made by order of the clerk of the proper court, but shall be made only in cases of attachment, forclosure, claims and delivery, or other proceedings where specific property is to be affected, or the procedure is such as is known as a proceeding *in rem*. After return is made, as aforesaid, the case being such as hereinbefore mentioned, the plaintiff or one of the plaintiffs may file in the office of the proper clerk an affidavit stating that the defendant resides out of the State, or has departed from the State without the intention of returning, or concealed himself to avoid the service of process and giving his post office address, if known, or stating his post office address is not known to affiant, whereupon the order of publication shall be made by the clerk. The order shall direct the publication to be made in a public newspaper published in the county. Such publication shall be made at least once a week for four successive weeks. When the affidavit gives the post office address of the defendant, the clerk shall mail a copy of the summons, duly stamped, to the defendant, at such address forthwith. The service shall be complete at the expiration of ten days from the date of the last publication."

Attachment of Real Property.

FIRST. "Real property standing on the records of the county in the name of the defendant, shall be attached by filing a copy of the writ together with a description of the property attached, with the recorder of the county."

Paragraph First of Sec. 104, Mills' Ann. Code.

"The writ shall be directed to the sheriff of any county in which the property of such defendant may be *and require him to serve a copy of the writ on the defendant* and to attach and safely keep all of the property of such defendant within his county * * * ."

Sec. 97, Mills' Ann. Code.

Section 96 of the Code in so far as it relates to the matter of service of process, reads as follows:

"The defendant *after the service of the writ of attachment upon him or after he has due notice thereof as hereinafter provided*, his agent or attorney, at any time within the time prescribed for answering may, by affidavit, traverse and put in issue the matters alleged in the affidavit upon which the attachment is based; * * *

"If the defendant fail to traverse the plaintiff's affidavit, the attachment shall be deemed sustained; but it shall not be necessary to have an actual return of the writ before resorting to service by publication or to personal service out of the State, provided the other requisites of constructive service are complied with; the defendant shall also be deemed to have due notice of the attachment when he enters a general appearance, or shall be personally or constructively served, as provided by this act."

Sec. 96, Mills' Ann. Code.

Prorating Statute.

Sec. 92a. "That no final judgment shall be rendered in a cause wherein an attachment writ has been issued and a levy made thereunder, until the expiration of thirty days after such levy has been made, and any reditor of the defendant making and filing an affidavit nd undertaking, as hereinbefore required of the plain-

tiff, together with his complaint setting forth his claim or demand constituting his cause of action against the defendant, shall, *upon application to the court wherein such action is brought*, be made a party plaintiff in such action, and *may have like remedies* against the defendant to secure his claim or demand, as the law gives to the original plaintiff."

Sec. 92c. "The final judgment in said action shall be a *several* judgment, wherein each creditor named as plaintiff shall have and recover of the defendant the amount of his claim or demand, as found to be due, together with his costs; and the money realized from the attachment and garnishee proceedings shall, under the direction of the court, after paying all the costs taxed and included in the said *several* judgments, be paid to the several judgment-creditors in proportion to the amount of their several claims as adjusted and included in such several judgments; and the surplus of any such moneys, if any, shall be paid to the defendant by order of the court."

Actions to Remove Cloud from Title.

An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate or interest."

Mills' Ann. Code, Sec. 255.

Suits to Remove Cloud from Title where Service is Constructive.

"In all actions pending in any court of record of this State, or which may hereafter be brought in any such court, wherein any defendant is not found within the jurisdiction of the court, and constructive service alone is had, and which is brought * * * for the removal of cloud from title to real estate * * * or in any other proceeding *in rem*, or affecting only specific property, where according to the usual practice in courts of chancery, the court, if the defendant had been personally served, might direct or decree any act to be done or performed by the defendant in favor of the plaintiff, the court may appoint a trustee for such defendant to

do and perform in the place and stead of and for each defendant the act required by the decree rendered in any such cause. Any act lawfully done by such trustee, under and in pursuance of any such decree shall be as binding and effectual for all purposes as if done and performed by the defendant in pursuance of such decree."

Sec. 2535, Mills' Ann. Code.

Jurisdiction of the Court of Appeals of Colorado.

Sec. 406d. "The Court of Appeals shall have jurisdiction

FIRST. To review the final judgments of inferior courts of record in all civil cases and in all criminal cases not capital.

SECOND. It shall have final jurisdiction, subject to the limitations stated in subdivision three of this section, where the judgment, or in replevin the value found is two thousand five hundred dollars or less, exclusive of costs.

Third. It shall have jurisdiction not final in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the Constitution of the State or of the United States is necessary to the decision of the case; also, in criminal cases, or upon writs of error to the judgments of county courts. Writs of error from or appeals to the Court of Appeals shall lie to review final judgments within the same time and in the same manner as is now or may hereafter be provided by law for such review by the Supreme Court."

Sec. 406d Mills' Ann. Code.
(L. '91, pages 119–120, Sec. 4.)